TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 178.

JOHN T. LUDELING, PLAINTIFF IN ERROR,

vs.

JOHN CHAFFE, CHARLES CHAFFE, J. E. McGUIRE, SHERIFF, AND AUSTIN GREEN, CLERK, &c.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED OCTOBER 8, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 178.

JOHN T. LUDELING, PLAINTIFF IN ERROR,

vs.

JOHN CHAFFE, CHARLES CHAFFE, J. E. McGUIRE, SHERIFF, AND AUSTIN GREEN, CLERK, &c.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court	1	1
Petition	1	1
Affidavit for injunction	21	9
Order for injunction	21	9
Waiver of service	21	9
Bond for injunction	22	10
Exception for Breard filed	23	10
Recusation	23	11
Peremptory execution filed and judge sworn	24	11
Exception set for trial	24	11
Exception tried	24	11
Exception sustained	25	12
Exception by Breard	25	12
Peremptory exception	27	13
Oath of T. A. Garrett	28	13
Note of evidence on exception	29	14
Rule to show cause	30	14
Motion for rule to show cause	30	15
Service of rule	31	15
Resignation of T. A. Garrett	31	15
Motion to set aside recusation filed, &c.	31	15
Motion to set aside recusation filed, &c.	32	16
Motion to set aside recusation overruled	32	16
Judge sworn, &c.	32	16
Prayer for trial by jury filed	33	17
Prayer for trial by jury filed	33	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 24, 1891.

	Original.	Print.
Order setting cause	34	17
Jury waived	34	17
Motion for recusation filed, &c.	34	17
Motion for recusation	34	18
Motion for recusation overruled, &c.	35	18
Motion for order of appeal, &c.	36	18
Answer of J. and C. Chaffe	37	19
Answer of clerk and sheriff	38	19
Plaintiff's bill of exceptions	38	20
Case referred to T. A. Garrett	39	20
T. A. Garrett sworn, and continuance	39	20
Plea to jurisdiction filed	40	21
Plea to jurisdiction	40	21
Exception set for trial	42	22
Plea tried, &c.	42	22
Resignation of T. A. Garrett	42	22
Motion to refer case filed	43	22
Motion to refer case to district judge	43	23
Case referred to W. F. Millsaps	45	24
Answer to motion to refer	45	24
Oath of W. F. Millsaps	47	25
Exception filed and set for hearing	48	25
Exception overruled	48	25
Cause set for hearing	48	26
Amended petition allowed, objections to interrogatories sustained, and prayer for jury denied	49	26
Amended petition	49	26
Affidavit to petition	53	28
Objections to interrogatories	54	28
Answers of John Chaffe to interrogatories	55	29
Answers of Charles Chaffe to interrogatories	56	30
Plaintiff's bill of exceptions	56	30
Motion to take for confessed overruled and case taken up	58	31
Motion to take for confessed	58	31
Plaintiff's bill of exceptions	58	31
Minutes of trial and submission	60	32
Judgment	60	32
Motion for new trial overruled	60	32
Allowance of appeal	61	33
Opinion	61	33
Motion for new trial	77	40
Motion for appeal	77	40
Note of evidence	78	41
Testimony of W. W. Potts	78	41
Austin Green	80	42
W. H. Gayle	81	42
J. E. McGuire	82	43
R. W. Richardson	84	44
Austin Green (recalled)	86	45
C. J. Boatner	86	45
F. B. Ludeling	87	45
J. T. Ludeling	94	49
F. P. Stubbs	100	51
J. T. Ludeling (recalled)	104	53

	Original.	Print.
Note of evidence in case No. 1668, Chaffe *vs.* Ludeling	105	53
Testimony of J. E. McGuire	106	54
Austin Green	109	54
W. F. Atkins	110	56
R. W. Richardson	111	56
Franklin Garrett	115	58
A. Green (recalled)	120	60
Robert Ray	121	61
J. S. Sanders	122	61
George W. Miller	126	63
A. J. McQuiller	128	64
A. Green (recalled)	132	66
J. T. Ludeling	133	66
A. Green (recalled)	142	70
A. Green (recalled)	143	70
W. W. Farmer	144	71
Talbot Stillman	147	72
H. Moise	152	74
Talbot Stillman (resumed)	155	76
R. W. Richardson (recalled)	156	76
Millard F. Parker	166	80
W. W. Farmer (recalled)	169	82
John M. Breard	174	84
Robert M. Breard	178	85
John T. Ludeling (resumed)	181	87
Petition in case No. 1668, Chaffe *vs.* Ludeling	183	87
Answer and call in warranty in case No. 1668, Chaffe *vs.* Ludeling	187	89
Answer, &c., of Dinkgrave in case No. 1668, Chaffe *vs.* Ludeling	193	92
Amended answer of administrator in case No. 1668, Chaffe *vs.* Ludeling	197	94
Exception of Mrs. Strother in case No. 1668, Chaffe *vs.* Ludeling	199	95
Amended answer in case No. 1668, Chaffe *vs.* Ludeling	200	95
Amended answer of warrantor in case No. 1668, Chaffe *vs.* Ludeling	201	96
Judgment in case No. 1168, Chaffe *vs.* Ludeling	204	96
Mandate of supreme court of Louisiana in Chaffe *vs.* Ludeling	206	97
Petition in case No. 1305, Warfield *vs.* Calhoun and Parker	208	98
Order for injunction in case No. 1305, Warfield *vs.* Calhoun and Parker	212	99
Judgment in case No. 1305, Warfield *vs.* Calhoun and Parker	213	100
Answer in case No. 1305, Warfield *vs.* Calhoun and Parker	214	100
Act of sale, Mrs. Warfield to Dinkgrave, June 30, 1875	224	103
Petition in case No. 1020, Chaffe *vs.* Warfield	227	104
Judgment in case No. 1020, Chaffe *vs.* Warfield	231	105
Petition for appointment of Green, administrator in matter of succession of Mrs. Warfield	232	106
Order authorizing Green to administer	234	107
Oath of Green as administrator	235	107
Petition for revival in case No. 1020	235	108
Acceptance of service of petition in case No. 1020	238	109
Citation to Atkins in case No. 1020	238	109
Service of citation in case No. 1020	239	109
Answers filed in case No. 1020	240	110

	Original.	Print.
Minutes of hearing in case No. 1020	240	110
Answer of administrator in case No. 1020	240	110
Answer of Atkins in case No. 1020	241	110
Judgment in case No. 1020	241	111
Copy of judgment in case No. 1020	242	111
Inscription of judgment in case No. 1020	244	112
Reinscription of judgment in case No. 1020	245	112
Answer of Cobb, curator, in case No. 1020	245	113
Judgment of revival in case No. 1020	245	113
Fi. fa. in case No. 1668	247	114
Sheriff's return on *fi. fa.* in case No. 1668	249	115
Interrogatories to K. Lowe	250	115
Deposition of K. Lowe	252	116
Order of sale in No. 1549	255	118
Sale by assignee	256	118
General order in bankruptcy	261	121
Schedule B—Statement of property	262	122
Petition to bond and release property	265	123
Bond releasing property	265	123
Deed of Weis to King	267	124
Deed of King to Rosenfield	271	126
Deed of Rosenfield to Stubbs	278	129
Plaintiff's bill of exceptions	282	130
Appeal bond	283	131
Clerk's certificate	284	132
Minute of docketing cause	285	132
Minute of submission	285	132
Judgment	286	133
Rehearing refused	286	133
Motion to amend	287	133
Opinion	288	134
Application for rehearing	297	137
Assignment of errors	307	141
Application for time to elaborate argument	309	142
Petition for writ of error	311	143
Reasons for allowance of writ of error	314	144
Bond for writ of error	315	145
Writ of error (copy)	317	146
Citation to John and Charles Chaffe (copy)	319	147
Austin Green (copy)	321	147
J. E. McGuire (copy)	322	148
Clerk's certificate	324	149
Assignment of errors	325	149

a No. 1201, Supreme Court docket.

Filed June 14th, 1888.

ROB. J. WILLSON,
Cl'k Sup. Court, La.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.* } No. 2382. 5th Dist. Court.

Appeal from the 5th district court, parish of Ouachita.

J. T. Ludeling, in person, appellant; Stubbs & Russell, C. J. & J. S. Boatner, attorneys for defend-ts & appellees.

1 *Petition. Filed May* 8, 1884.

STATE OF LOUISIANA,
Parish of Ouachita.

5th District Court.

The petition of John T. Ludeling, a resident of the parish and State above named, with respect represents that he is the legal owner and possessor of the north half of section one, in township seventeen, range four east, north of Red River, in the parish of Ouachita, containing about three hundred acress.

That he acquired said property, with all the rights, title, and interest therein and thereto, which the succession of Bernard H. Dinkgrave had in and to said land at the succession sale of the property of said Dinkgrave, deceased.

He alleges that John & Charles Chaffe, of the parish of Orleans, State of Louisiana, claim to have a mortgage thereon resulting from the registration of a judgment in their favor against Mrs. Eliza W. Warfield prior to the sale by said Warfield to said Dinkgrave.

He alleges that since the purchase by B. H. Dinkgrave from Mrs. Warfield, believing that he held a perfect title to and that the land was free from all privileges or mortgages, as he had paid the parish and State taxes due by Mrs. Warfield, the price of his pur-
2 chase, and had the said land released from seizure under *fi. fas.* against Mrs. Warfield for that purpose, the said Dinkgrave and your petitioner have made large and valuable improvements on said land, consisting of deadening about one hundred and twenty acres in 1875 and 1876, and since the purchase of petitioner, and in clearing about sixty acres of land, ditching and fencing same, and putting it in cultivation, and in building two cabins on this land and outbuildings.

He avers that the timbers deadened on the land have generally fallen and rotted and the land can now be comparatively easily cleared and put in cultivation, and in his opinion had enhanced the value of the land eight to ten dollars per acre. He avers that the clearing of said land above mentioned, putting it in cultivation,

ditching and fencing the same, and putting the necessary buildings thereon have enhanced the value of the land from thirty to fifty dollars per acre, in his opinion. He avers that he is entitled to be paid the enhanced value of the land, caused by said improvements, which were made in good faith and were necessary to bring said land into cultivation.

3 Petitioner avers that when John & Charles Chaffe brought their hypothecary action against him he set forth in his answer that he and his vendor had made large and valuable improvements which had enhanced the value of the land, and on the trial offered to prove the same, but said Chaffe-, by their attorneys, objected to this being done at that time, and the court of the first instance refused to permit evidence on this point at that time, but reserved the right of petitioners to have the court pass upon the question in another suit, and the supreme court affirmed this judgment.

Petitioner avers that after the decision of the supreme court John Chaffe wrote to petitioner asking him what he proposed to do about the judgment which they had against petitioner, and petitioner replied that Chaffe was mistaken in supposing they had a personal judgment against him, that the judgment refer-ed to had simply recognized their judicial mortgage on a piece of land belonging to and in the possession of petitioner, subject to the right of petitioner for the enhanced value of the land created by improvements made thereon by himself and his vendor, the right to establish which had been reserved by the judgment.

4 Shortly after this John Chaffe met petitioner on the railroad train and they traveled together from Monroe to Gordon's station. Chaffe took a seat by petitioner and they talked about the business. Petitioner told John Chaffe that they (J. Chaffe & petitioner) being acquainted with the property could probably agree about the value of the land and about the enhanced value caused by the improvements made thereon by petitioner and his vendor, and then petitioner would either pay the price agreed upon, less the enhanced value created by the improvements, or Chaffe could pay the enhanced value and take or sell the property. Said Chaffe acquiesced to this proposition.

Petitioner then asked him when they could meet and informed him he, petitioner, would be in New Orleans in the course of two weeks, and Chaffe replied it was uncertain when he would be back in the city, but that he would let petitioner know later, which, however, he has not yet done.

Your petitioner avers that he has therefore taken no action to establish his right aforesaid earlier, believing that under said agreement it would be unnecessary.

5 Petitioner avers that, notwithstanding said agreement, J. & C. Chaffe or their attorneys have caused a writ to issue in said case and have caused the land aforesaid to be seized and advertised for sale on the 17th of May, 1884, and your petitioner fears and believes that the sheriff of the parish of Ouachita

will proceed to sell the same under said writ unless restrained by an injunction.

Your petitioner avers that the right of your petitioner above stated cannot be settled except judicially or amicably between Chaffe and your petitioner, and that a sale under said writ without first fixing the right of your petitioner in and to said property for his improvements before mentioned would cause your petitioner loss and injury.

Your petitioner avers further that the judgment in the case of John & Charles Chaffe *vs.* J. T. Ludeling, No. 1663, only recognized a judicial mortgage on a tract of land in the possession of J. T. Ludeling, a third possessor, resulting from the registration of a judgment in their favor against Mrs. Warfield, the former owner of said tract of land, and that no *fieri facias* can be legally issued in said case against J. T. Ludeling, but only an order of seizure and sale to sell the tract subject to the judicial mortgage in his possession, according to law; but the clerk has illegally issued a writ of *fieri facias* and the sheriff, in acting under it as such, — contrary to law.

6 Your petitioner further alleges that at the time when the sheriff, through his deputy, served notice of seizure upon him petitioner directed him to have the property advertised in the Ouachita Bulletin, a newspaper published in the parish of Ouachita, but that the sheriff, disregarding his directions, has illegally advertised the sale in the Telegraph, another newspaper published in said parish, contrary to the right, wish, and directions of the defendant in execution in said case and the law of the State.

Your petitioner further avers that the judgment in the case of J. & C. Chaffe *vs.* Eliza W. Warfield, & by virtue of which he claims a mortgage upon the land aforesaid of your petitioner, was seized on the 20th of March, 1874, and was recorded on the 21st of March, 1874. He pleads the prescription of ten years against said judgment and pre-emption of the mortgage for want of reinscription within ten years.

He denies that the attempt to revive the judgment aforesaid has had that effect or that the judgment if revived has been recorded within ten years from the first inscription.

He avers that the ten years from the signature of the judgment and from the rendition of the judgment expired since the judgment in the case of John & Charles Chaffe *vs.* J. T. Ludeling, third possessor.

7 He avers that Eliza W. Warfield was declared a bankrupt upon her own petition on or about the 11th of September, 1876; that Wm. T. Atkins was subsequently appointed assignee, and the title of Mrs. E. W. Warfield to her property became vested in the assignee and related back to the date of her bankruptcy; that said assignee disposed of all the property except Bon-air, which did not come into his actual possession under the order of the district court of the United States, to which he rendered an account of his doings relative thereto on or about the 16th of October, 1869, and, in the opinion & belief of petitioner, became *functus officio*, and Mrs. Eliza W. Warfield left this State permanently early in 1880, and

she died in the State of Tennessee, as petitioner has been informed and as he believes, in the latter part of 1880 or early in 1881.

He avers that a rule was taken upon her under general order of the district court of the United States of Nov. 17th, 1881, to show cause why a discharge should not be denied her for neglecting to proceed and take steps for obtaining a discharge seasonably, and that no action was had on the rule for want of service, and that she had never been discharged.

8 Petitioner avers that at the date of her death, some time in 1880 or 1881, he is informed Mrs. E. W. Warfield did not reside in this State, and she did not own or possess any property in this parish of Ouachita, unless it was Bon-air plantation, claimed to have been bought by J. & C. Chaffe at sheriff's sale on the 16th of September, 1876, after Mrs. E. W. Warfield had been declared a bankrupt, and more particularly described hereinafter; and if she owned that property its value was several times greater than five hundred dollars, and the clerk of the court was unauthorized by law to administer the same.

He avers that the order of the judge authorizing Austin Green to administer said estate was made in error, is illegal, unauthorized by law, and null and void.

He denies that any legal service of citation or petition has been served on any legal representative of Mrs. E. W. Warfield.

He denies that Atkins (assignee, if he was such at the time of said service, which is denied) could be sued in the State court, the said debt of J. & C. Chaffe having already been proved and recognized in the district court of the United States having jurisdiction of the bankruptcy proceedings against the estate of E. W. Warfield.

9 Petitioner alleges that he has been informed and he believes that when the citation in the suit of Chaffe was served said Atkins was sick in bed and too unwell to attend to business, and that he died on the 22d February, 1884.

He denies that Austin Green, clerk, legally represented the succession of E. W. Warfield, and he charges that the judgment of revival in the case of J. & C. Chaffe *vs.* E. W. Warfield has no validity or legal effect.

He charges that said judgment was obtained irregularly by collusion between those pretending to represent Mrs. E. W. Warfield's estate or the assignee and the plaintiff.

Petition was filed 9th of February, 1884. Citation was issued and served on same day. Cobb & Green waived citation on same day or 18th February. Case was fixed for trial for the next day, 20th; was signed on that day. On 22nd Atkins died.

Your petitioner further avers that by law the creditor who has a general mortgage can only act against the property of which his debtor has disposed in the order in which the alienations have been made, beginning at the most recent and ascending to the most ancient; that your petitioner's vendor, B. H. Dinkgrave,

10 purchased the north half of section one, township seventeen north, of range four east, from Eliza W. Warfield in about June, 1875; that on or about the 16th of September, 1876, John

and Charles Chaffe claim to have purchased the lower or west half of Bon-air plantation, situated on Bayou de Siard, in the parish of Ouachita, at sheriff- sale under execution issued in the suits of A. Miltenberger & Co. and J. W. Murill *vs.* E. W. Warfield and R. C. Strother and Wife, L. D. McLain, ex., *vs.* E. W. Warfield, and Oliver & Byrne *vs.* E. L. Strother and others.

Your petitioner avers that if said sales were valid, which is denied, it was made under consent decrees and on terms different from those provided by law for forced or judicial sales, to wit, for cash, without appraisement, and such sale did not have the effect of a judicial or forced sale of relieving mortgage.

He further alleges that the executions issued in the case aforesaid and under which it is claimed Bon-air plantation and other tracts were sold to J. & C. Chaffe had expired before any legal seizure of said property was made, and that taking certified copies of the writ by the sheriff after the writs had expired without a seizure had no legal effect, and there was no valid or legal writ in the hands of the sheriff when the alleged sale was made.

There was no valid seizure of the property. The sheriff never took actual possession thereof. The property (a plantation in cultivation) at the time the seizure is alleged to have been made was under leases to J. W. Parker, C. H. Calhoun, and Ben. Woodward, of Ouachita parish, and that said lessees lived upon said plantation and cultivated separate portions thereof, and that they or none of them were disturbed in their possession of the property or notified or informed of any seizure thereof by the sheriff or any one else, and that the rents were never seized nor were said lessees required to attone to the sheriff; but, on the contrary, said lessees continued to occupy and cultivate said plantation and to pay their rents to Mrs. E. W. Warfield, her agent for the years 1875 and 1876.

Your petitioner further avers that before any legal seizure of the property aforesaid, to wit, on the 11th Sept., 1876, Mrs. E. W. Warfield went into bankruptcy and surrendered this property, with other property placed on her schedule, which was assigned to the assignee appointed.

Petitioner believes and he alleges that the jurisdiction of the district court of the United States attached to this property from the date of the filing of the bankrupt's petition in said court, and that any attempted disposition of said property by the State court was without jurisdiction, null, and void. Petitioner avers that Dinkgrave, his vendor, acquired the north half of section one, township seventeen north, of range four east, before any litigation between Mrs. E. W. Warfield and her creditors or other persons in regard to Bon-air or other property alleged to have been sold to Chaffe by the sheriff on or about the 16th of September, 1876, and that there is no privity between E. W. Warfield and your petitioner as to any suit or other transactions of Mrs. Warfield in regard to said Bon-air or other property alleged to have been sold to said J. & C. Chaffe.

Your petitioner avers that he has been informed and he believes that a warrant for protection, or document so termed, was issued by

the register in bankruptcy and served upon the sheriff or his deputy to prevent his interference with said property, and that the chief deputy consulted the sheriff's counsel, who advised him not to make the sale advertised unless an indemnity bond was given, which plaintiffs in execution refused to give, and their counsel and C. H. Morrison, one of the attorneys of J. & C. Chaffe, insisted upon the sale being made, and threatened to sue him, the sheriff, and his sureties (and the chief deputy, Samuel Whited, was one of
13 them) unless the sales were made. The deputy again consulted his counsel, who advised him that if he made any sale only to offer for sale such right or interest as Mrs. E. W. Warfield had in and to said property on that day, and your petitioner is informed and believes that that was all that was offered by the deputy at the public outcry and adjudicated to J. & C. Chaffe. The price bid was grossly inadequate to the value of the plantation advertised for sale.

Your petitioner further avers that he has been informed and believes that, in pursuance to legal advice given him, the chief deputy instructed S. Wood, the deputy who made the outcry, not to sign any deed or act of sale until after the same had been submitted to the legal adviser and counsel of the sheriff, but that C. H. Morrison, the attorney of J. & C. Chaffe, wrote the act of sale in the afternoon and night of the day of sale and sent a person with the deed to a house out of town a mile or more, whither the deputy had gone to avoid being called upon to sign the act, before he could show it to the sheriff's legal adviser, and the said messenger of C. H. Morrison, attorney of J. & Chaffe, took with him another person and went to the place where they ascertained the deputy had gone, at
14 night and after said deputy had retired for the night, and presented the deed for him to sign, which he did without reading it or having heard it read and in ignorance of what statements were made in the deed, through intimidation and fear of personal violence, as he has stated under oath.

Your petitioner avers that he is informed and he believes that there existed a good deal of excitement in the neighborhood of Monroe when the sale was made, on that day and some time before; that the sheriff had left the parish, through fear of personal violence, a short time before, and that there existed a great deal of fear and apprehension among the colored people in or about Monroe at that time.

He avers, therefore, that said act of sale should not be regarded as an authentic act or as binding upon him, having been illegally and improperly obtained and containing false and fraudulent statements. He alleges that he has been informed and believes that no returns were ever made on said copies of executions after said pretended sale by the sheriff or his deputy, or that any portion of the price was ever paid to the sheriff or his deputy, or that the sheriff ever put J. & C. Chaffe in possession of said property. Your petitioner further avers that the sale aforesaid was under consent decrees and without appraisement of the property, for cash.

15 He avers that E. W. Warfield was largely in debt and in

embarrassed circumstances when she gave those confessions of judgment, and that she had actually been declared a bankrupt before the day of the sale aforesaid, and that she could not legally have waived appraisement at a public sale, and if it be regarded as a public or forced sale it is absolutely null and void, because the law requires the property should bring two-thirds of its appraised value in cash at the first offering in order to make a sale.

Petitioner alleges if the said sale be regarded only as a consent sale or private sale it did not affect the general mortgage on the property, and the judicial mortgage of J. & C. Chaffe would not be affected by this sale unless it was extinguished by confession to the extent of the value of the property, which it is alleged and believed was equal to the debt of said mortgage creditors.

Your petitioner avers that if said illegal sale have any validity, which is denied, it was an alienation of the property subsequent to the sale to Dinkgrave, petitioner's vendor, and must be proceeded against before that in the possession of your petitioner can be
16 acted against; otherwise serious damage and missery will be inflicted on your petitioner.

Petitioner avers that the Bon-air plantation, alleged to have been purchased by J. & C. Chaffe as aforesaid, was leased by them and was subsequently sold by them to A. G. Breard, since deceased; that said property, containing about seven hundred and forty-five acres, was worth from eight to ten thousand dollars at the alleged sale, and the rents or f-uits of said property was worth five dollars per acre per annum for the cleared land, between 200 & 300 acres, and said J. & C. Chaffe are responsible for said rents, which should be applied to the extinguishment of their debt, together with said property.

Your petitioner avers that the heirs of A. G. Breard have partitioned their father's estate, and that the part of Bon-air plantation claimed to have been bought by J. &. C. Chaffe and by them sold to A. G. Breard, a resident of the parish of Ouachita, has been assigned to Robert Breard, a resident of the parish of Ouachita, who is now in possession thereof.

Your petitioner further avers that if Bon-air plantation was seized by the sheriff he was bound by law to seize the rents & collect them and apply them to the payment of the judgment under which
17 the seizures are alleged to have been made, and that said rents would have very nearly if not quite extinguished said judgment without a sale, no delivery or forthcoming bond for the property having been given by defendant.

Your petitioner further avers that in addition to said Bon-air plantation the said J. & C. Chaffe have acquired the following property surrendered by Mrs. E. W. Warfield, to wit: a dwelling-house and lot, with kitchen and outbuildings, the lot fronting on the river two hundred and six, running back 250 feet, for $1,500; lot in Monroe, corner of Breard's St. and Walnut street, having 60½ feet front by 165 feet deep, for $200; a claim of Mrs. Warfield in the Court of Claims against the United States for $3,331, for $10.00; the north ½ of section 3, T. 17, R. 4 east, containing 320 acres, on or near the

bend of the railroad, for $160; part of sec. 21, T. 18, R. 4 east, north of Bayou De Siard, cont'g 64.75 acres, for $32; all that part of sec. 33 lying east of the prolongation of west line of sec. 21, T. 18, R. 4 east, to township line between township- 17 and 18, cont'g 65 acres, for $32.50.

Your petitioner avers that said property was sold under an order of the district court of the United States for the benefit of
18 J. & C. Chaffe for cash without appraisement and without the advertisement required by the laws of Louisiana for judicial sales and without notice to your petitioner of said order or the application therefor, and he believes and he avers that said sale did not have the effect of extinguishing the mortgage thereon as far as your petitioner or parties not before the bankrupt court are concerned. He avers, therefore, that said property is subject to the mortgage of said J. & C. Chaffe unless it has been extinguished by confession, and said property must be proceeded against before that in the possession of your petitioner can be sold to pay said mortgage.

Your petitioner avers that said property was sacrafiсed and sold for a price grossly inadequate; that the dwelling-house and lot, with the outbuildings, were well worth $3,500, the lot on corner of Breard and Walnut street $500, and the lands adjoining Bon-air plantation and near the railroad were worth eight to ten dollars per acre.

Petitioner avers that Mrs. Warfield and Dr. Strother and his wife and family resided in said dwelling-house from the date of
19 the filing of Mrs. Warfield's petition in bankruptcy, the 11th September, 1876, until about the date of the sale, in summer or fall of 1879.

He avers that said parties owed rents therefor; that he believes about fifty dollars per month rent would be fair. He avers that he has been informed and he believes that said Chaffe agreed with Dr. Strother or Mrs. Warfield or both to release them from the rents, and that accordingly the assignee did not claim rents from them, and petitioner claims that this was done to his injury and loss and contrary to good conscience and equity if his property is to be subjected to the payment of said mortgage.

Your petitioner further avers that J. & C. Chaffe had no right to use the mortgage claim to sacrifice all the hereinbefore-described property, worth much more than the mortgage debts of the Chaffe and other mortgage creditors hereinbefore mentioned; that natural justice requires that one man should not be permitted wantonness, caprice, cupidity, greed, or malice to do an injury to another.

Your petitioner avers that $2,500 are charged in the execution as cost for fee of curator *ad hoc* illegally and unjustly against him.

Petitioner avers that in his opinion an injunction is necessary to protect his rights and to prevent a serious injury to him.

20 Wherefore he prays that J. E. McGuire, sheriff of Ouachita; John Chaffe, Charles Chaffe, residents of the parish of Orleans, and Robert Breard, a resident of the parish of Ouachita, be cited to answer hereto.

That an injunction issue restraining the sheriff from proceeding further against the property of your petitioner until all the property

aforesaid alienated since the sale by Mrs. Warfield to B. H. Dinkgrave in 1875 be first subjected to the mortgage of said J. & C. Chaffe, and that for that purpose the sale alleged to have been made by Deputy Sheriff Wood to J. & C. Chaffe on or about the 16th of September, 1886, be declared null and void and subject to said special mortgage of J. & C. Chaffe, unless it be held that said mortgage has been extinguished by confusion, prescription, or persumption.

He further prays that the sale of the property before described, sold under order of the district court of the United States by Atkins, assignee, be declared to have been made without affecting the mortgages thereon in so far as the right of your petitioner, a third possessor, are to be effected. He further prays Austin Green be cited, and that the order appointing Austin Green, clerk, administrator of the estate of Mrs. Warfield be set aside and declared null and
21 void. Your petitioner further prays that injunction be made perpetual, and for cost and general relief, &c.

J. T. LUDELING,
D. C. MORGAN,
Att'ys.

Affidavit for Injunction.

STATE OF LOUISIANA, }
Parish of Ouachita. }

Personally came and appeared before me, the undersigned authority, John T. Ludeling, who makes oath that the facts and allegations in the foregoing petition are true & correct, to the best of his knowledge and belief, so help him God.

JOHN T. LUDILING.

Sworn to and subscribed before me this 4th day of May, 1884.
AUSTIN GREEN, *Clerk D. C.*

Order for Injunction.

Let a writ of injunction issue as prayed for upon petitioner executing bond, conditioned according to law, in the sum of twelve hundred dollars, $1,200. Done and signed in chambers this the 8th of May, 1884.

R. W. RICHARDSON,
Judge 5th District.

Waiver of Service.

Service of the above order of injunction is hereby accepted and citation waived this 8th day of May, 1884.

J. E. McGUIRE, *Sheriff.*

Waiver of Service.

22 Service of petition acknowledged and citation waived May 8th, 1884.

AUSTIN GREEN.

Bond for Injunction. Filed 8 May, '84.

5th District Court.

STATE OF LOUISIANA,
Parish of Ouachita.

Know all men by these presents that J. T. Ludeling, as principal, and Mrs. Ellie Morgan, security, are held and firmly bound unto J. E. McGuire, sheriff, and John & Charles Chaffe, heirs and assigns, in the full sum of twelve hundred dollars; for the payment whereof, well and truly to be made, we hereby bind ourselves, our heirs and legal representatives, firmly by these presents.

Dated this 8th day of May, 1884.

The condition of the above obligation is such that whereas the above-bounden J. T. Ludeling hath this day sued out an injunction in the 5th district court in and for the parish and State aforesaid against the proceedings of sheriff in the execution of a writ of *fi. fa.* issued in the suit of John and Charles Chaffe *vs.* J. T. Ludeling, No. 1668, and the judge of the 5th district court having fixed the amount of bond to be given by the said J. T. Ludeling at twelve hundred dollars:

Now, therefore, if the said Ludeling, as principal, shall well and truly pay all such damages as shall be decreed against
23 him in case it should be decided that this injunction was wrongfully sued out and obtained, then and in that case this obligation to be null and void; otherwise to remain in full force and effect according to law.

JOHN T. LUDELING.
ELLIE MORGAN.

I authorize my wife to sign the above.

D. C. MORGAN.

Acknowledged before me on this 8th day of May, 1884.

AUSTIN GREEN,
Clerk D. C.

Minute.

WEDNESDAY, *September 10th*, 1884.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

Exception for Breard.

JNO. T. LUDELING
vs.
J. & C. CHAFFE. } 2382.

Peremptory exception for Breard filed.

Minute: Recusation.

THURSDAY, *September* 11*th*, 1884.

Court opened pursuant to adjournment.
Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

2382.—In this case the judge recuses himself, having been of counsel.

Minute: Sept. 15*th*, '84, *Judge Garrett Sworn.*

24 MONDAY, *September* 15*th*, 1884.

Court opened pursuant to adjournment.
Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

JNO. T. LUDELING
vs.
J. & C. CHAFFE *et al.*

Peremptory execution filed. T. A. Garrett, Esq., took the constitutional oath to try the case.

Minute: Exception Set for Trial.

MONDAY, *September* 22*nd*, 1884.

Court opened pursuant to adjournment.
Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.
T. A. Garrett, Esq'r, presiding.

JNO. T. LUDELING
vs.
JNO. & C. CHAFFE *et al.* } 2382.

Honl. R. W. Richardson, judge, presiding.
Exception set for 24 inst.

Minute: Exception Tried.

THURSDAY, *October* 2*nd*, 1884.

Court opened pursuant to adjournment.
Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. Hanna, d'y sheriff.

J. T. LUDELING
vs.
J. & C. CHAFFE *et al.* } 2382.

Exception taken up for trial, the introduction of evidence concluded, and argument postponed until Monday morning next.

25 *Minute: Exception Sustained.*

MONROE, LA., *October 6th*, 1884.

Court opened pursuant to adjournment.

Present: Hon. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff; T. A. Garrett, judge *ad hoc*, presiding.

J. T. LUDELING
vs.
J. & C. CHAFFE *et al.* } 2382.

Case argued; exception sustained.

TUESDAY, *Oct. 7th*, 1884.

Court opened pursuant to adjournment.

Present: Hon. R. W. Richardson, judge; A. Green, c'lk; J. E. McGuire, sh'iff.

J. T. LUDELING
vs.
J. & C. CHAFFE. } 2382.

Answer filed.

Exception by Breard. Filed Sept. 10, 1884.

J. T. LUDELING
vs.
J. E. MCGUIRE, Sh'ff, *et al.*

Fifth District Court, Parish of Ouachita, Louisiana.

Robert M. Breard, made defendant in the above styled and numbered suit, without in any manner answering to the merits, pleads as a peremptory exception and perpetual bar to pl'tiff's action that all the allegations and pretentions set forth by pl'tiff, J. T. Ludeling, as a basis of his demand against this defendant have been passed upon by final and definitive judgments in this and the supreme court of the State of Louisiana and are now *res adjudicata*. Defendant respectfully shows that in the suit of J. & C. Chaffe *vs.* Jno. T. Ludeling, No. 1668 on the docket of your hon. court, all the issues and allegations now set forth in pl'tiff's petition as the basis of his demand against this defendant were set forth and urged by
26 the said Jno. T. Ludeling and by his warrantor & privy, the succession of B. H. Dinkgrave, dec'd, as a defense to the demands of said Jno. & Chas. Chaffe, pl'tiffs in said suit No. 1668, against him, the said J. T. Ludeling, and were decided by final and definitive judgments in both the said district and supreme courts. Respondent further shows that said John and Charles Chaffe sold the land described in pl'tiff's petition to A. G. Breard, and at the partition of the property of the succession of the said A. G. Breard said land was acquired and received by this respondent as one of the heirs and by inheritance from the said A. G. Breard; that the said Jno. & Charles Chaffe are hence the authors of respondent's title

and are full privies in estate and case with him, and that respondent is entitled as much to be protected by the said judgment and decrees as are the said John & Charles Chaffe, his privies, and that between respondents and said Ludeling all of said issues are *res adjudicata*.

Wherefore this defendant prays that pl'tiff's demands against him be dismissed with costs and for general relief, &c.

POTTS & HUDSON,
Att'ys for R. M. Breard.

27 *Peremptory Exception. Filed 15th Sept., '84.*

State of Louisiana, 5th Dist. Court Ouachita.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.* } 2382.

John & Charles Chaffe, defendants in this action, without answering to the merits, except to all that portion of plaintiff's petition which is included between the words Atkins died, on the 9th page of the copy served on them, and the words "Your petitioner avers that $2,500, &c.," on the 20th page.

1. That plaintiff is estopped from urging the allegations and points therein set forth by the final judgment in the case of E. W. Warfield or Calhoun and Parker in the parish court of Ouachita.

2. By the judgment of dismissal in the United States circuit court in New Orleans of Atkins' Assignee *vs.* Your Affiant and 3 more; especially by the proceedings and judgment in the case No. 1668, of J. & C. Chaffe *vs.* J. T. Ludeling, decided by this hon. court and finally by the supreme court; that in the first two cases the pl'tiff herein is bound by judgment against Mrs. Warfield and her representatives as being her privy, and in the latter plaintiff was actually a party.

That all the issues presented in that portion of plaintiff's petition herein excepted to were either presented or should
28 have been presented if properly plead, and that the judgments in those several cases are conclusive against the issues now presented by plaintiff and *res adjudicata*, and that plaintiff is estopped now from renewing in this action the issues that were either actually presented or should have been presented in said former suits. Wherefore defendants pray that the portion of plaintiff's petition indicated and the prayer consequent therein be dismissed, and for costs, &c.

FRANK P. STUBBS, *Att'y.*

Oath of T. A. Garrett. Filed 15th Sept., '84.

I do solemnly swear that I will support the Constitution and laws of the United States and the laws & constitution of this State, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as lawyer selected to try the case of J. T.

Ludeling *vs.* J. & C. Chaffe *et al.* according to the best of my ability and understanding, so help me God.

THOS. A. GARRETT,
Attorney-at-Law.

Sworn to & subscribed before me this 15th Sept., 1884.
AUSTIN GREEN, *Clerk.*

29 *Note of Evidence on Exception. Filed 2nd Oct., '84.*

5th District Court, Parish of Ouachita, State of Louisiana.

JOHN T. LUDELING
vs.
JOHN & C. CHAFFE *et al.* } 2382.

Note of evidence on trial of exception.

Defendants offer in evidence—

1st. Record of the suit No. 1668, entitled J. & C. Chaffe *vs.* J. T. Ludeling, specially including the petition, amended petition, answer and call in warranty, amended answer, answer of warrantor Dinkgrave, and two amended answers of warrantor; also all the evidence received on the trial of said case, the judgment of the district court, and the judgment on appeal by the supreme court.

2. Record of the suit No. 1305, entitled Mrs. Warfield *vs.* Calhoun & Parker. Objected to by plaintiff on the ground that it is *res inter alios actra.*

Objection sustained and evidence excluded. Bill of exception retained by def'ts, with leave of the court to annex the record to the bill.

Plaintiff offers in evidence—

Copy of the act of sale from Mrs. Warfield to B. H. Dinkgrave

I certify that the above and foregoing is all the evidence adduced on the trial of said exception.

This the 2nd October, 1884.

AUSTIN GREEN, *Clerk.*

30 *Minute: Rule to Show Cause.*

TUESDAY, *January 27th*, 1885.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

J. T. LUDELING
vs.
J. & C. CHAFFE *et al.* } 2382.

Rule to show cause why the testimony of K. Loew taken by commission should not be read in evidence on the trial of this case filed. Ordered that cause be shown on or before trial.

Motion for Rule to Show Cause. Filed Jan'y 27th, 1885.

JNO. T. LUDELING
vs.
J. &. C. CHAFFE *et al.* } No. 2382.

The plaintiff in the above-entitled cause respectfully represents that the testimony of K. Loew, deputy clerk of U. S. D. C., has been taken by commission and returned to this court, wherefore he prays the defendant be made to show cause on or before the trial why testimony of said witness should not be read in evidence.

He prays that this rule be served and for general relief.

J. T. LUDELING,
In Pro Per.

Service of Rule.

31 Received in office January 27th, 1885, and on the same day, month, and year I served a certified copy of this rule to show cause on F. P. Stubbs, att'y, in person in Monroe, La.

Serving rule, 50 cents.

J. E. HANNA, *D'y Sheriff.*

Minute: Resignation of T. A. Garrett as Judge ad hoc.

FRIDAY, *January 30th*, 1885.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

J. T. LUDELING
vs.
J. & C. CHAFFE *et al.* } 2382.

In this case T. A. Garrett tendered his resignation as lawyer appointed to try the case, which was accepted by the court.

Minute: Motion to Set Aside Recusation.

MONDAY, *Feb'ry 2nd*, 1885.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

JNO. T. LUDELING
vs.
JNO. & CHAS. CHAFFE *et al.* } 2382.

Motion to set aside order of recusation filed, and motion set for trial Wednesday morning next.

32 *Motion to Set Aside Recusation. Filed 2nd Feb'y,* 1885.

In District Court Ouachita.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.*

Special Judge Thomas A. Garrett in this cause having heretofore tried at the September term dist. court the exceptions of *res adjudicata* and sustained the same, and now having resigned his appointment, averring that by the disposition of the pleas of *res adjudicata* by Judge Garrett there remains no possible question in the cause for which the judge of the court should recuse himself or which for any reason he is incompetent to try, defendants move the court to set aside from this day the order of recusation, and that the cause be set down for trial by him, and they pray for general relief, &c.

FRANK P. STUBBS, *At'y.*

Minute: Motion for Setting Aside Recusation Refer'd to J. S. Boatner.

SATURDAY, *February 7th,* 1885.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

J. T. LUDELING
vs.
JOHN & C. CHAFFE *et al.* } 2382.

Motion to set aside order of recusation tried and overruled, and case referred for trial to J. S. Boatner, Esq., to whom the con-
33 stitutional oath was administered and who took the bench.

Plaintiff asks that the plea of prescription be taken up and first tried separately, which was objected to by defendants for the reason that it is a particular ground of action on which this action is based, and that it would be trying the whole case. Objection overruled. Plaintiff excepts.

Minute: Prayer for Jury.

TUESDAY, *May 12th,* 1885.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. B. H. Simpson, d'y sh'ff.

J. T. LUDELING
vs.
JOHN & CHAS. CHAFFE *et al.*

Prayer for trial by jury filed.

Prayer for Jury. Filed 12th May, '85.

STATE OF LOUISIANA,
Parish of Ouachita.

JNO. T. LUDELING
vs.
J. & C. CHAFFE *et al.*

The plaintiff, with leave of the court, files this his amended petition, asking for a trial by jury, and he avers he has deposited with the clerk twelve dollars jury fee, as required by law.

Wherefore he prays for trial by jury and for general relief, &c.

J. T. LUDELING, *In Pro. Per.*

34 *Minute: Setting Cause.*

WEDNESDAY, *January 27th*, 1886.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson judge; Austin Green, clerk; J. E. McGuire, sheriff.

J. T. LUDELING
vs.
J. & C. CHAFFE *et al.* } 2382.

Set for Monday, first February.

Minute: Jury Waived.

MONDAY, *February 1st*, 1886.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

J. T. LUDELING
vs.
J. & C. CHAFFE *et al.* } 2382.

In this case trial by jury is waived by pl'ff.

Minute: Motion for Recusation.

THURSDAY, *March 11th*, 1886.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

John S. Boatner, presiding.

J. T. LUDELING
vs.
J. & C. CHAFFE *et al.* } 2382.

Motion for recusation of judge *ad hoc*, presiding, filed and argument of motion postponed until to-morrow.

Motion for Recusation. Filed 11th Mar., '86.

Fifth District Court, Ouachita.

STATE OF LOUISIANA:

35 The plaintiff in the above-entitled case respectfully represents that J. Boatner, Esq., was appointed to try this case on the — day of ——.

That Honl. R. W. Richardson recused himself on the — day —— and that since the appointment of the judge *ad hoc* the said J. Boatner, Esqr., has been elected a senator to the General Assembly of the State of Louisiana; that under the constitution of this State, articles 14 and 15 of the constitution of 1879, no person holding office in any one of the different departments shall exercise power properly belonging to either of the others.

Wherefore plaintiff moves that J. Boatner, Esq., recuse himself, and for such orders as may be necessary in the premises.

J. T. LUDELING.

Minute: Motion for Recusation Overruled; Motion for Appeal.

FRIDAY, *March 12th*, 1886.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. Hanna, d'y sheriff.

J. S. Boatner, judge *ad hoc*, presiding.

J. T. LUDELING
vs.
J. & C. CHAFFE *et al.*

Motion for recusation taken up, argued, and overruled. Plaintiff asks for an order of appeal from the judgment overruling motion, & this motion is postponed.

36 *Minute: Motion for Order of Appeal; J. S. Boatner Resigns.*

MONDAY, *March 15th*, 1886.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

John S. Boatner, judge *ad hoc*, presiding.

JOHN T. LUDELING
vs.
JOHN & CHARLES CHAFFE *et al.* } 2382.

Motion for order of appeal filed. John S. Boatner, Esq., heretofore appointed judge *ad hoc* to try this case, now resigns.

Motion for Order of Appeal. Filed 15th Mar., '86.

STATE OF LOUISIANA,
Parish of Ouachita.

JOHN T. LUDELING
vs.
JOHN & CHARLES CHAFFE *et al.*

The plaintiff in the above-entitled case respectfully prays for an order for a suspensive and devolutive appeal from the orders or judgment of the court refusing to refer the question of his recusation to another judge and overruling the motion for his recusation rendered in the above-entitled cause on the 12th of March, 1886. He prays that said appeal may be made returnable to the supreme court of the State of Louisiana, at Monroe, at its next term, to wit, the first Monday of June, 1886, according to law, and that an amount be fixed by the court for a bond for a sus-
37 pensive and for a devolutive appeal according to law.

J. T. LUDELING.

Answers. Filed Oct. 7, 1884.

The State of Louisiana, Fifth District Court, Parish of Ouachita.

JOHN T. LUDELING
vs.
JOHN & C. CHAFFE *et al.*

Defendants, J. & C. Chaffe, since their p-remptory exception of *res adjudicata* and estoppel has been sustained, now for answer den*ies* each and every recurring allegation and insists upon proof by plaintiff. Further answering, avers that no allegation of plaintiff's petition justified a resort by him to this remedy of injunction, but that this proceeding by plaintiff is solely for delay and to hinder by illegal means respondents in the enforcement of their legal rights; that injunction sued out is a wanton abuse of the remedy; that they have been forced to employ counsel at an expense of five hundred dollars to procure the dissolution of the injunction, and that it is fully worth that sum; wherefore they pray that the suit of plaintiff be dismissed, and the injunction dissolved with the highest rate of general damages—the law allows 20 *% cent.*—& for $500 special damages against plaintiff, an injunction, and his surety *in solido*, & for cost & for general relief, &c.

FRANK P. STUBBS, *Att'y.*

38 A. Green, clerk, and J. E. McGuire, sheriff, made nominal parties, adopt the allegations in the answer of J. & C. Chaffe, the real defendants, as *his* own, & prays, as in said answer, that the injunction be dissolved, with costs, &c.

J. E. McGUIRE, *Sheriff.*
AUSTIN GREEN, *Clerk.*

Pl'tiff's Bill of Exceptions. Filed 15 *Mar.*, '86.

State of Louisiana, Parish of Ouachita, Fifth District Court.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.*

Be it remembered that on the 11th of March, 1886, the judge *ad hoc* appointed to try the above-entitled cause called the said case for fixing, whereupon the plaintiff filed a written motion for recusation, which is made a part hereof, and after having read the same to the court moved the court to refer the question of recusation to some one else to be tried and decided. The court adjourned the case until the next day for argument, and, after argument of the motion to refer the question of recusation to another person, the judge *ad hoc* refused to refer the question of recusation to another judge & ordered that the written motion for recusation be proceeded with.

39 To which ruling of the judge *ad hoc* plaintiff excepted, & he tenders this his bill of exception, which he prays may be signed.

Be it further remembered that on the trial of said written motion for the recusation of the judge *ad hoc* the said judge overruled the motion for his recusation; to which ruling the plaintiff excepted & tendered this his bill of exceptions, which he prays may be signed, & which is accordingly signed on this 15th day of March, 1886.

JNO. S. BOATNER,
Judge ad hoc.

Minute: Case Referred to T. A. Garrett.

SATURDAY, 8*th May*, 1886.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

JOHN T. LUDELING
vs.
JOHN & C. CHAFFE *et al.*

This case is referred to Thos. A. Garrett, Esq.

Minute: Continued.

MAY 10TH.

JOHN T. LUDELING
vs.
JOHN & C. CHAFFE *et al.* } 2382.

Thos. A. Garrett, to whom this case was referred, was duly sworn and took the bench. Case continued.

40 *Minute: Plea to Jurisdiction Filed.*

MONDAY, *October* 18*th*, 1886.

The honorable the 5th judicial district court in and for the parish of Ouachita, State of Louisiana, was regularly opened at the court-house of said parish, pursuant to law, on this 18th day of October (3rd Monday), 1886.

T. A. Garrett, judge *ad hoc*, presiding.

JNO. T. LUDELING
vs.
JOHN & C. CHAFFE *et al.* } 2382.

Plea to jurisdiction of judge *ad hoc* plead.

Plea to Jurisdiction. Filed 18 *Oct.*, '86.

Fifth District Court, Parish of Ouachita, State of Louisiana.

To the hon. judge of said court presiding in and for the parish of Ouachita:

JOHN T. LUDELING
vs.
JOHN & C. CHAFFE *et al.*

The plaintiff in the above-entitled case represents that at the last term of this honorable court, and on the last day of court, and during the absence of plaintiff, Judge R. W. Richardson appointed Thos. A. Garrett judge *ad hoc* to try said case. Plaintiff avers that at the time of said appointment and for a long time previously Judge Richardson had recused himself, and appointed an attorney to try said case as judge *ad hoc*, to wit, Thomas A. Garrett, who quali-
41 fied as judge *ad hoc* and subsequently resigned the position and moved out of the parish; that Mr. John Boatner was appointed by consent of parties to try the case, and he qualified and acted as judge *ad hoc* in said case.

That after his election to the senate plaintiff filed a motion for the recusation of said judge *ad hoc*, who refused to recuse himself. Plaintiff then moved the judge *ad hoc* to appoint a judge to try the question of recusation, which he refused; to both of which ruling plaintiff took bills of exception.

Plaintiff asked for an order for an appeal from said decision.

Whereupon the judge *ad hoc* said he had made up his mind to resign, and did so, and directed the clerk to enter upon the minutes of the court his resignation as judge *ad hoc*. It was after this that said district judge, already recused, appointed Thos. A. Garrett judge *ad hoc* again. Plaintiff avers that said dist. judge had no right or authority to make any order in the case after his recusation, and that Thos. A. Garrett, who claims to act as judge *ad hoc* under an appointment made at the last term of the court by Judge Richard-

son, recused, is without any right, authority, or jurisdiction to try said case. Wherefore he pleads to the jurisdiction of said
42 Thomas A. Garrett as judge *ad hoc* in this case.

JOHN T. LUDELING.

Minute: Exception Set.

TUESDAY, *December 7th*, 1886.

Court opened pursuant to adjournment.
Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.
T. A. Garrett, judge *ad hoc*, presiding.

JOHN T. LUDELING
vs.
JOHN & C. CHAFFE *et al.* } 2382.

Exception set for trial on 8th inst.

Minute: Plea Tried; Judge Garrett Resigns.

WEDNESDAY, *Dec. 8th*, 1886.

Court opened pursuant to adjournment.
Present: Honl. R. W. Richardson, judge; Austin Green, clerk; S. B. Willis, d'y sh'ff.
T. A. Garrett, judge *ad hoc*, took the bench.

J. T. LUDELING
vs.
JOHN & CHARLES CHAFFE *et al.* } 2382.

Plea to jurisdiction of judge *ad hoc* taken up, tried, and T. A. Garrett, Esqr., tenders his resignation as judge in this case. See written resignation filed.

Resignation of T. A. Garrett.

I hereby tender my resignation as judge *ad hoc*, appointed by the court to try this case, for the reason that I believe I have not the requisite constitutional qualifications under the act of
43 1880 to sit as recused judge in this district, having left the district with the intention of changing my domicil and having returned less than two years before my appointment.

THOS. A. GARRETT,
Att'y-at-Law.

Monroe, 8 Dec., 1886.

Minute: Motion to Refer Case.

THURSDAY, *Dec. 9th*, 1886.

Court opened pursuant to adjournment.
Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

Motion to refer cause to dist. judge filed.

Motion to Refer to Dist. Judge. Filed Dec. 9th '86.

State of Louisiana, 5th Dist. Court, Ouachita.

JNO. T. LUDELING
vs.
J. & CHARLES CHAFFE *et al.* } 2382.

Defendants, John & Charles Chaffe, showing that your honor, Judge Richardson, at the September term of your honorable court, 1884, your honor having recused yourself as having been of counsel and referred the case for trial to Thomas Garrett, Esqr., a lawyer then having the necessary qualifications, who, having qualified at the same time, presided on the trial and passed upon the peremptory exceptions filed by the defendants, and, being then about to remove from the district, resigned his said appointment, no further action could be had in said cause at that term of the court; that subsequently, at the January term, 1885, the case was referred by
44 your honor to J. S. Boatner, who qualified as special judge by taking the oath on the 7th Febr'y, 1885.

That no action was had towards the trial of the case at that term of the court nor until the March term, 1886, because of reasons beyond their control, when J. S. Boatner, the second special judge selected, on being elected to the State senate, on a motion to recuse him as then being disqualified Mr. Boatner resigned as special judge; whereupon Judge Thomas A. Garrett, having returned to Ouachita and no other member of the bar having the necessary qualifications of a judge being willing to act again, accepted the reference of said cause to him as special judge, but that an exception and plea to his jurisdiction being filed, and the same being heard at the present term of your honorable court, Judge Garrett, for the reasons stated therein and filed in the cause, urged his second appointment, all of which facts appear from the minutes and pleadings filed in said cause. Now, therefore, defendants in injunction move your honor, who by the vacation of the references to special judges is again vested with jurisdiction for the purpose, that you may appoint some district judge of an adjoining district to try this cause, and that the judge so appointed be notified thereof in the manner provided by law, and for cost, &c.

FRANK P. STUBBS, *Att'y.*

45 *Minute: Ans. to Mo. to Refer.*

FRIDAY, *December 10th*, 1886.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sh'ff.

Answer to motion to refer case to district judge filed.

Case Referred to W. F. Millsaps; Sworn.

JOHN T. LUDILING
vs.
J. & C. CHAFFE *et al.* } 2382.

Motion to refer tried and case referred to W. F. Millsaps, Esqr., who was duly sworn.

Answer to Motion to Refer to Dist. Judge. Filed Dec. 10th, '86.

STATE OF LOUISIANA,
Parish of Ouachita.

Fifth District Court.

JOHN T. LUDELING
vs.
JNO. & CHARLES CHAFFE *et al.*

The plaintiff in the above-entitled suit, for answer to the motion or rule asking that his honor R. W. Richardson refer this case to a district judge, avers that Judge R. W. Richardson recused himself in said case and appointed a lawyer judge *ad hoc* to try the case in 1884, and that said judge *ad hoc* resigned and Mr. J. Boatner was appointed by consent.

That Mr. Boatner qualified as judge *ad hoc*, and, having been elected to the State senate, a motion was filed by the plaintiff for his recusation, and, as judge *ad hoc* having intimated doubts as to his recusing himself, a motion was filed by the plaintiff to
46 *to* have that question tried by another person. Both motions were opposed by defendants and argued, and then by the judge were refused, and bills of exception to said rulings were taken and signed, and an order for an appeal was asked for; whereupon Mr. Boatner, judge *ad hoc*, resigned the office or position of judge *ad hoc* without making any appointment of a successor or granting the appeal.

Then, at a subsequent term of the court, the district judge, R. W. Richardson, who had already recused himself in the case, on the application of the defendant-, again appointed T. A. Garrett judge *ad hoc*, and the plaintiff filed a plea to the jurisdiction of said judge *ad hoc* to act in the matter and objected to his acting as judge *ad hoc* under said appointment on the grounds stated in said motion or plea, which is referred — & made a part of this answer.

Mr. Thomas Garrett, after argument by plaintiff and defendant- and a statement by defendants' counsel that plea should be sustained, the judge *ad hoc*, resigned, after giving in writing his reasons therefor.

Plaintiff avers that his honor, the judge of this district, R. W. Richardson, recused himself on the ground of having been of counsel & then appointed a judge *ad hoc* to try the case; that his
47 authority or right to act in this case was thus exhausted & he is *functus officio* in this case.

Plaintiff denies that there are no lawyers at this bar having the necessary qualifications, or that they have refused to act since the first appointment made, in 1884.

Plaintiff therefore denies the right or authority of Judge R. W. Richardson to make any order or to make any appointment of a judge in this case under the law, & he prays that the said district judge refuse to act in the case.

JNO. T. LUDELING, *In Pro. Per.*

Oath of W. F. Millsaps.

Oath of office.

I, W. F. Millsaps, do solemnly swear that I will support the Constitution and laws of the United States and the constitution and laws of this State, and that I will faithfully & impartially discharge and perform all the duties incumbent on me as lawyer appointed by the court to try the case, No. 2382, entitled John T. Ludeling *vs.* John & Charles Chaffe *et al.*, Hon. R. W. Richardson, judge, recused, according to the best of my ability and understanding, so help me God.

W. F. MILLSAPS.

Sworn to & subscribed before me this tenth day of December, 1886.

AUSTIN GREEN, *Clerk D. C.*

48 *Minute, 24 Jan'y, '87: Exception Filed.*

THURSDAY, *January 24th*, 1887.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

W. F. Millsaps, Esqr., presiding.

JOHN T. LUDELING
vs.
JOHN & C. CHAFFE *et al.* } 2382.

Exception filed and set down for trial to-morrow morning.

Minute: Exception Overruled.

TUESDAY, *January 25th*, 1887.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

W. F. Millsaps, Esq., presiding.

JNO. T. LUDELING
vs.
JOHN & CHARLES CHAFFE *et al.* } 2382.

Exception taken up, tried, and overruled.

Minute: Setting Cause.

TUESDAY, *May* 1*st*, 1888.

Court opened pursuant to adjournment.
Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.
W. F. Millsaps, judge *ad hoc*, presiding.

J. T. LUDELING
vs.
J & C. CHAFFE *et al.* } 2382.

Set for Wednesday, 9th inst., without prejudice.

49 *Minutes: Am'd Petition Allowed; Objections to Intergs. Sustained; Jury Denied.*

SATURDAY, *May 5th*, 1888.

Court opened pursuant to adjournment.
Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.
W. F. Millsaps, judge *ad hoc*, presiding.

J. T. LUDELING
vs.
J. & C. CHAFFE *et al.* } 2382.

Amended petition allowed and filed. Defendants' allegation to being required to answer certain interrogatories therein mentioned sustained and defendants excused from answering interrogatories mentioned in the objections. Prayer for jury denied.

Amended Petition, with Interrogatories. Filed 5 *May*, 1888.

Fifth District Court, Parish of Ouachita.

STATE OF LOUISIANA:

JNO. T. LUDELING
vs.
JOHN & C. CHAFFE *et al.*

The plaintiff in the above-entitled suit with respect represents that since the institution of this suit circumstances and facts have come to his knowledge which make him believe that John & Charles Chaffe are not the real owners of the judgment in the cases of J. & C. Chaffe *vs.* John T. Ludeling, in the district court in and for the parish of Ouachita aforesaid; that by a contract they transferred an undivided half interest therein to F. P. Stubbs on the condition and in consideration of his prosecuting said suit against John T.
50 Ludeling, third possessor, successfully as a fee, and paying the cost of said suit or suits, and since then he has acquired the other interest in said judgment by purchase or otherwise.

He avers that J. & C. Chaffe, the pretended plaintiffs in execution in the case of J. & C. Chaffe *vs.* John T. Ludeling, have no interest or standing in the case as plaintiffs in execution, and that the execution was improperly issued in their names.

Petitioner avers that the seizure of his property in this case was illegal and a trespass and has caused him damages to the extent of five hundred and fifty dollars at least, in this, to wit, in trespassing upon his property by having it seized and taken out of his possession and advertised for sale without just or legal cause & by compelling him to procure security to release the property and for the injunction bond, so that he could cultivate it and carry out his contracts with his tenants thereon, two hundred and fifty dollars for the trouble, vexation, & expense, & time given by himself & his attorney in prosecuting this suit three hundred dollars.

He avers that in his opinion this amendment is necessary in the interests of justice, & he prays that it may be allowed.

He avers that the answers of John & Charles Chaffe, defendants, to the following interrogatories and facts and articles are in
51 his opinion necessary & material, and he prays that they may be ordered to answer them on or before the second day of the next term of this court, according to law, to wit:

1. Who is the owner at present of the judgment in the case of J. & C. Chaffe *vs.* E. W. Warfield under which the hypothecary action against the property of J. T. Ludeling is being prosecuted in the district court of Ouachita parish?

2. Who is the present owner of the judgment in the suit of J. & C. Chaffe *vs.* J. T. Ludeling which was enjoined in this suit?

3. If more than one person is interested in said judgment- or in either of them, state their names.

4. Is not F. P. Stubbs the owner of said judgments?

5. Is he not the owner of one of them; if so, which one?

6. If not the sole owner of both or of one of said judgments, what interest does he own in one or both of said judgments?

7. Was not the action or suit against the property of J. T. Ludeling in the suit of J. & C. Chaffe *vs.* J. T. Ludeling instituted at the instance or suggestion of F. P. Stubbs?

8. Was not the agreement or contract with him this, that he should have one-half of the judgment or the amount thereof for collecting it & nothing if he failed?

9. If not one-half, what portion was he to have?

52 10th. Was it not also a part of the agreement that F. P. Stubbs was to pay the costs of the suit or suits?

11. Was it not also a part of the contract that he was not to receive anything if he failed?

12. Was it not a part of the agreement that he should have control of said judgment- against E. W. Warfield & John T. Ludeling, & that you should not have the right to compromise, sell, or settled said judgments or either of them?

13. Who employed Charles J. Boatner in the case of J. & C. Chaffe *vs.* J. T. Ludeling in the district court of Ouachita? Did not

Mr. F. P. Stubbs employ him? Did not Mr. F. P. Stubbs pay him his fee?

14. Is not Mr. F. P. Stubbs the present owner of the judgment in the case of J. & C. Chaffe *vs.* J. T. Ludeling?

15. When did he acquire that judgment?

16. What did he give for it?

17. How did he settle for it?

18. Did not F. P. Stubbs employ J. C. Boatner in the instant case?

19. Was not there an agreement or compromise between you and R. C. Strother or Ray, representing Mrs. Warfield or assignee, in 1878 or 1879, that the suit pending in the eastern dist. court of the U. S., at New Orleans, should be settled by the sale of the real estate of Mrs. Warfield placed on the schedule in bankruptcy
53 in full satisfaction of your judgment against Mrs. Warfield; that rents for the dwelling-house occupied by Dr. Strother & family should not be claimed by you, and that you should pay the fee of John Ray, att'y for Atkins' assignee, &c.?

20. Did you not instruct Mr. Atkins in writing that you did not require that the rents for the house occupied by him & his family should be collected by him?

21. Did you not pay John Ray's fee?

22. Did you not cause all of the real estate of Mrs. Warfield to be sold and did you not buy it all in?

Wherefore he prays that this supplemental and amended petition be allowed by the court, & that it be served on defendant according to law, and that John & Charles Chaffe, of New Orleans, be ordered to answer the interrogatories according to law; that there may be judgment in his favor as prayed for in his original petition & for five hundred and fifty dollars damages as aforesaid & for costs. He prays for costs of suit, for trial by jury, and for general relief.

J. T. LUDELING,
In Pro. Per.

Affidavit.

John T. Ludeling, plaintiff, being sworn, states that the facts and allegations set forth in the foregoing petition are true and correct, to the best of his knowledge and belief.

J. T. LUDELING.

54 Sworn to and subscribed before me this 3d day of May, 1888.

AUSTIN GREEN, *Clerk.*

Objection to Interrogatories. Filed 5th May, 1888.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.* } 2382.

The defendants object to the allowance of an order requiring defendants John Chaffe and Charles Chaffe to answer the interroga-

tories on facts and articles propounded in the amended petition on the following grounds:

To 7th they object that the answer thereto would not in any event be pertinent to any issue in this case.

To the 8th on same grounds.
" 9 " "
" 10 " "
" 11 " "
" 12 " "
" 13 " "

And to the 19, 20, 21st, and 22d on the grounds that it is an attempt to introduce a new issue in this case and to alter the substance of plaintiff's demand, and on the further ground that the answers to said interrogatories would not be responsive to the issue in this cause, and changes the issues formed by the pleadings.

Respectfully submitted,

C. J. & J. S. BOATNER,
Of Counsel.

55 5th Dist. Court, Parish of Ouachita, State of Louisiana.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.* } No. 2382.

Answers of John Chaffe. Filed 5th *May*, '88.

Answers of John Chaffe to the interrogatories on facts and articles propounded to him by plaintiff.

Being first duly sworn, he answers as follows:

To 1st interrogatory he answers: John & Charles Chaffe, of New Orleans.

2d. John & Charles Chaffe, of New Orleans.

3rd. Their names are John & Charles Chaffe.

4th. He is not.

5th. He is not owner of either.

6th. He owns no interest in either of the judgments aforesaid, except a contingent fee in what he may recover for us.

14th. He is not.

15th. He never did acquire it.

16th. He never bought it and never gave anything for it.

17. Not having purchased it, he had no settlement to make for it.

18. I believe he got C. J. Boatner, Esq., to assist him in the case.

JOHN CHAFFE.

Sworn to & subscribed before me this 5th day of May, 1888.

AUSTIN GREEN, *Clerk.*

56 *Answers of Charles Chaffe. Filed* 8 *May*, 1888.

Answers of Charles Chaffe under oath to the annexed interrogatories.

Int. 1st. John Chaffe and Charles Chaffe, of New Orleans, La.
" 2nd. John Chaffe and Charles Chaffe, of New Orleans, La.
" 3rd. John Chaffe and Charles Chaffe.
Int. 4. No.
" 5. No.
" 6. None in either judgment.
" 14. No.
" 15. Never.
" 16. Nothing, as I never sold it.
" 17. There was no sale, hence nothing to settle for.
" 18. I do not know.

CHARLES CHAFFE.

Sworn to and subscribed before me May 7th, 1888.

BENJAMIN ORY,
Not. Public.

STATE OF LOUISIANA, }
Parish of Ouachita. }

Fifth District Court.

JNO. T. LUDELING }
vs. }
J. & C. CHAFFE *et al.* }

Be it remembered that on the 11th of March, 1886, the judge *ad hoc* appointed to try the above-entitled cause called the said case for fixing; whereupon the plaintiff filed a written motion for
57 recusation, which is made a part hereof; after having read the same to the court, moved the court to refer the question of recusation to some one else, to be tried and decided.

The court adjourned the case until the next day for argument, and after argument of the motion to refer the question of recusation to another person the judge *ad hoc* refused to refer the question of recusation to another judge & ordered that the written motion for recusation be proceeded with.

To which ruling of the judge *ad hoc* plaintiff excepted, & and he tenders this his bill of exception, which he prays may be signed.

Be it further remembered that on the trial of said written motion for the recusation of the judge *ad hoc* the said judge overruled the motion for his recusation; to which ruling the plaintiff excepted and tendered this his bill of exceptions, which he prays may be signed, & which is accordingly signed on this the 15th day of March, 1886.

JNO. S. BOATNER,
Judge ad Hoc.

58 Saturday, 8th of May, 1886.

Minute: Motion to Take for Confessed Overruled; Case Taken up.

MONDAY, *May 9th*, 1888.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sh'ff.

W. F. Millsaps, Esq., judge *ad hoc*, presiding.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.* } 2382.

Motion to take interrogatories for confessed filed, tried, and overruled, case taken up for trial, and the introduction of evidence continued till the hour of adjournment.

Motion to Take for Confessed, 9 May, '88.

5th District Court, Parish of Ouachita, La.

LUDELING
vs.
CHAFFE.

Plaintiff moved that the answers of defendants be taken as confessed, not having answered all the questions propounded or ordered to be answered.

JNO. T. LUDELING,
In Pro. Per.

Pl'ff's Bill of Exceptions, 9th May, '88.

JOHN T. LUDELING
vs.
J. & C. CHAFFE. } No. 2382.

Be it remembered that on the 4th day of May, 1888, plaintiff offered to file a supplemental and amended petition in this case, which is a part hereof; that defendants' counsel objected to its filing and asked for time to examine it; that on the 5th of
59 May the written objections filed and the minutes of the court as to the ruling of the judge *ad hoc* are hereto annexed and made a part hereof. In the supplemental petition a trial by jury was asked for. To this part of the amended petition the objections urged was that the prayer for a jury came too late, the case having been fixed for trial, and the judge *ad hoc*, sustaining the objection, refused the jury. On Tuesday, 1st May, the judge *ad hoc* was requested to take the bench by defendants' counsel, and he was asked to fix the case for trial. Plaintiff had not yet reached the court-room, but had been *been* notified by counsel on the day before that he would ask to have it fixed, and the judge *ad hoc*, in absence of the plaintiff, fixed the case for Wednesday, the 9th of May, with-

out prejudice. The minute of the court in this case I hereto annex and made a part hereof. So also is the rule of this court in regard to calling and fixing cases. This was the first and only time the judge *ad hoc* had called this case or taken any action in it at this term of the court. Plaintiff, with respect, prays that this bill of exceptions may be signed. The prayer for jury was filed after the jury for the term had been discharged.

W. F. MILLSAPS,
Judge ad Hoc.

60 *Minute: On Trial.*

THURSDAY, *May* 10*th*, 1888.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

W. F. Millsaps, Esq., judge *ad hoc*, presiding.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.*

Trial of case resumed.

Introduction of evidence concluded and argument continued till the hour of 4 o'clock p. m., & further argument adjourned until Monday next.

Minute: Argument Concluded.

MONDAY, *May* 14*th*, 1888.

Court opened pursuant to adjournment.

Present: Honl. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

W. F. Millsaps, judge *ad hoc*, presiding.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.*
No. 2382.

Argument of case resumed.

Argument concluded and case taken under advisement.

FRIDAY, *May* 18*th*, 1888.

Court opened pursuant to adjournment.

Present: Hon. R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sh'ff.

Minute: Judgment.

JNO. T. LUDELING
vs.
J. & C. CHAFFE *et al.* } No. 2382.

Judgment for defendants dissolving injunction. See decree.

SATURDAY, *May* 19*th*, 1888.

Court opened pursuant to adjournment.

Present: R. W. Richardson, judge; Austin Green, clerk; J. E. McGuire, sheriff.

W. F. Millsaps, Esq., judge *ad hoc*, presiding.

JNO. T. LUDELING
vs.
J. & C. CHAFFE *et al.*

Motion for new trial filed, submitted, and overruled.

61 *Minute: Motion for New Trial Overruled; Motion for Appeal Granted.*

Motion for appeal by plaintiff filed and, counsel for defendants being present, it is ordered that an appeal devolutive and suspensive be granted, returnable to the hon. supreme court of La. at its next term, at Monroe, on the 2nd Monday in June next, on plaintiff giving bond in the sum of one hundred dollars for a devolutive and suspensive appeal.

Opinion. Filed May 18*th*, 1888.

STATE OF LOUISIANA,
Parish of Ouachita.

Fifth District Court.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.* } 2382.

John & Charles Chaffe got judgment against Mrs. Eliza Warfield on March 20th, 1874. This judgment was only registered in the mortgage records for the parish of Ouachita on March 21st, 1874.

At the Monroe term of the supreme court in 1882 judgment was rendered in favor of the defendants and against the plaintiff in the present suit, recognizing a judicial mortgage resulting from the registry of J. & C. Chaffe's judgment against Mrs. Warfield upon the north half of section one, in township 17 north, of range four east, in the possession of J. T. Ludeling, and ordering him either to pay the judgment & costs or give up the land to be sold in satisfaction of the said mortgage.

There was also judgment in favor of J. T. Ludeling against his vendor, the succession of B. H. Dinkgrave, whom he had
62 called in warranty for the sum of twenty-five hundred and fifty dollars, the purchase price, and rejecting his demands for improvements placed by him on the land, but reserving his right to prosecute in a separate action.

On the 1st day of September, 1876, Mrs. E. W. Warfield, the defendant in the case of Chaffe *vs.* Warfield, upon her own petition was adjudged a bankrupt and W. T. Atkins was appointed the assignee of her estate. About 1879 she removed from the State of Louisiana and about 1881 she died in the State of Tennessee. On the 9th day of February, 1884, the judgment in the case of Chaffe *vs.* Warfield being about to prescribe, suit was instituted for its revival and citation prayed for to W. T. Atkins' assignee, A. Green, adm'r, and R. G. Cobb *curator ad hoc* appointed by the court to the heirs of Mrs. Warfield, who resided out of the State. Green and Cobb waived citation and service of petition. Atkins was cited on February the 9th, 1884. All parties defendants filed answers (general denial) on February 18th, 1884. Judgment of revival was rendered on February 20th, 1884, and duly and seasonably reinscribed.

These facts are necessary to be stated for proper understanding of the several issues involved in the case.

On the 4th day of March, 1884, the pl'tiff in the case of
63 John and Chales Chaffe *vs.* John T. Ludeling caused execution to issue on the judgment rendered therein and the property condemned to be sold in satisfaction of that judgment was signed and advertised for sale.

This sale was resisted by writ of injunction upon numerous grounds, and that is the case I now have before me.

Before answering, the defendants in injunction interposed a plea of *res judicata* and estoppel, which was tried before judge *ad hoc* Thos. A. Garrett, who afterwards resigned, and was sustained by him, and which action by him strips me of authority to pass upon the issues raised by that part of the petition which is excluded by the plea. Culverhouse *vs.* Marx, 38 A., 667.

It is left for me to consider the following grounds of injunction:

I.

That the judgment of J. & C. Chaffe against Mrs. E. W. Warfield is prescribed and the judicial mortgage incident thereto perempted, for the reason that the judgment of revival rendered on February 20th, 1884, is an absolute nullity; and the following grounds of nullity are urged:

1. That W. T. Atkins' assignee was *functus officio* when cited, that Mrs. Warfield was not a discharged bankrupt, & that the
64 property in contest has never been surrendered by her, and therefore he was incompetent to stand in judgment for her.

2. That in a personal action an absentee cannot be brought into court except by personal citation or through his property, & that in

no event can a curator *ad hoc* waive citation or any other legal right or defense; therefore citation upon R. G. Cobb was illegal and invalid.

3. That the appointmet of Austin Green, clerk, as adm'r of the succession of Mrs. Warfield was illegal and informal, and therefore could not be cited in a judicial proceeding affecting his estate. Was W. T. Atkins' assignee properly made a party to the suit for revival and did the citation upon him have the effect of binding the estate or succession of Mrs. Warfield?

In Scheves *vs.* Carreza, 33 An., 314, it is said: "The judgment reviving and the judgment revived must be considered and treated as one & the same; as blended together for an identical and common object. We regard a proceeding to revive a judgment not as a new suit, but simply as a proceeding in the same suit to continue and keep alive a judgment therein rendered, and to furnish proof that it has not been satisfied or extinguished." In the same case
65 it is expressly, emphatically, and distinctly decided that a suit, though prosecuted to judgment, is a pending suit until it is paid, satisfied, or otherwise extinguished.

Under this theory the case of Jno. and Chas. Chaffee *vs.* John T. Ludeling, though finally determined in 1882, is still a pending suit. In Serra é Hége *vs.* Hoffman, 29 A., p. 17, the court lay down these propositions:

1. That there is nothing in the bankrupt act which requires the assignee or which authorizes any court to compel him to become a party to a suit brought by or against the bankrupt, & that the assignee may use his own discretion with respect to suits pending in which the bankrupt is a party.

2. That where the assignee is satisfied that nothing is to be gained for the estate by defending or prosecuting such suit his duty requires him to take no part in the litigation & to leave it to be disposed of between the parties without interference by him.

3. What the law thus permits and enables the assignee to do in the exercise of a sound discretion it nowhere commands him to do, & if he does not choose to become a party voluntarily to suit pending in the name of the bankrupt we do not think that any court in which such suit may be pending has the power or authority
66 to make him a party or to compel him to submit to its jurisdiction and control.

4. That there is no law which warrants the conclusion that the effect of bankruptcy is to render the bankrupt *civilites mortuus*, but that where the bankrupt is defendant in a suit his capacity to stand in judgment is in no manner impaired. The adjudication simply furnishes him with defensive armour which he may employ or not at his discretion & pleasure.

5. That a bankrupt not discharged may stay all proceedings against him pending his application for a discharge.

6. That a discharged bankrupt may arrest and bar proceedings against him by pleading his discharge.

7. But that in either case the means of defense must be inter-

posed by injunction or plea, else the suit may be prosecuted to judgment.

These positions are deduced by Justice Marr, the organ of the court, from the opinion of the Supreme Court of the United States in the case of Eyster *vs.* Gaff, 91 U. S. (1 Otto), page 521, & from the text of the bankrupt act itself, & his reasoning, to mind, is absolutely conclusive.

If, then, it is a misnomer to style a proceeding to revive a judgment a suit, but a mere appen-age of one already pending,
67 & if it be true that an assignee cannot, without his consent, be made a party to a pending suit or compelled to submit to the jurisdiction of the court in which it is pending, it results by unassailable logic that if Atkins had not answered no valid judgment could have been rendered against him. Whether the mere formal answer filed by him was such an appearance as to bind Mrs. Warfield's estate need not be enquired into. Certainly it would seem that if a party over whose person a court has jurisdiction cannot be brought by process, *nolens volens*, into a suit pending in that court, then he is — a necessary party, and would represent nothing if there; but the supreme court in its latest utterance on the subject has laid down a different rule, &, however independent my mind may be, my judgment must submit to superior authority. Stackhouse *vs.* Zuntz, 36 An., 529.

This authority squarely holds that the assignee is the proper party to cite.

The plaintiff ins-ting that Mrs. Warfield was not a discharged bankrupt differentiates between the instant case and those heretofore decided by the Supreme Court & cited as authority here, it appearing that in all of the latter the bankrupt had been discharged. I fully appreciate the distinction; from my point of view, it is a
68 material and substantial one; but the reasoning upon which the authorities cited proceed does not and cannot consistently & logically recognize the distinction.

The theory of those cases is that the bankrupt is *civilites mortuus*, and that the assignee represents him for all judicial purposes.

It is plain that the assignee represents him no more fully and completely after the discharge than before.

Attention has been specially directed to the fact that Mrs. Warfield was dead at the date of the institution of the suit for revival, but according to the principle established in the Stackhouse case she was not, in contemplation of law, any more thoroughly annihilated than at the date of her adjudication as a bankrupt. Her estate remained & her assignee represented it. There is no proof in the record that Atkins had been relieved of his trust. It is true that he had filed an account & there is reason to believe that it was a final account of his administration, but so far as it appears by the evidence before me he had not been discharged by the court as required by law. R. S. (U. S.), sec. 5096.

I am forced to conclude, against my own judgment, therefore, that W. T. Atkins, assignee, was the proper party to be cited in
69 the revival proceeding, & that the judgment rendered therein

is valid. This conclusion dispenses me from passing upon the remaining two grounds of nullity urged by the plaintiff, & upon these I express no opinion.

II.

The plaintiff contends that the writ of *fieri facias* is not responsive to the judgment, the execution of which is enjoined in this cause. Orders of execution are different according to the nature of the judgments to be executed.

Judgments may direct that a thing shall be given, or that a thing be done or omitted, or that a sum of money be paid. This variety subjects the execution of each to different rules. C. P., 628. The appropriate writs applicable to these are, respectively, the writ of possession, the writ or order of distringas, and the writ of *fieri facias*. C. P. Arts., 630, 636, 641. There are no other writs allowable, to my knowledge, in execution of judgments, except the writ of seizure & sale, and obviously the executory process was not the proper proceeding in this case.

I think the defendants have not erred in this respect.

III.

As a third ground for quashing the writ of *fieri facias* issued herein it is urged & the plaintiff testifies that when notice of seizure was served on him he directed the sheriff to advertise the sale in
70 the Monroe (Ouachita) Bulletin, but that, in violation of this instruction, the advertisement was inserted in the Ouachita Telegraph.

To my mind this presents the most serious question in the case, & I have had great difficulty in reaching a conclusion satisfactory to myself.

Act 91 of 1876, section 2, provides "That when there are two or more newspapers published in the parish the defendant shall have the right of selecting a newspaper in which the advertisement is to made, if applied for within three days after the notice of such proceedings or the seizure made under the process."

Undoubtedly the legislature was not trifling when it passed this act. It was certainly intended to confer some rights, & cases can readily be imagined & may easily arise where the right might become a substantial one. The object of the law was mainly, it is supposed, to destroy the evil of official journalism.

The plea of requiring legal and judicial advertisements to be made in newspapers selected & designated for that purpose being abolished & the foregoing provision conferring the right of selection on the defendant, and, upon his default, upon the plaintiff, being blotted from the books by judicial legislation, what is to prevent the sheriff of a parish fruitful of
71 litigation to establish a newspaper, award it all the patronage within his gift, & conduct it in his own interest? Such a journal might, most probably would, be worthless as an advertising medium, & publication in it, while complying with the letter of the law, would defeat its spirit and purpose, which are to give publicity

to judicial sales. On the other hand, it must not be forgotten that the plaintiff in execution has rights which cannot be ignored. He possesses the undoubted right to have his judgment executed by seizure & sale of his debtor's property, but, in so far as he may have the direction and management of the proceeding, he must keep within the law. The obligation imposed by the act just quoted rests solely on the sheriff, & he is responsible to all parties for his usurpation of authority & for his unwarranted and illegal action.

Upon deliberate consideration of the rights and interests of both parties, I do not feel authorized to hold that a defendant in execution can arrest the sale of his property by injunction for this cause unless he allege & prove injury; as, for instance, that the newspaper in which the publication was made is without adequate circulation.

And in no event could damages or costs of proceedings be
72 equitably awarded against the defendant in injunction, but the sheriff ought in equity to be chargeable with these if asked for, whether the injunction be dissolved or not.

It will be improper for me to observe that this point, though insisted upon, was not vigorously pressed or argued. The writ of injunction must be dissolved.

The plaintiff alleges that he and his vendor have made valuable improvements on the land in contest since its acquisition from Mrs. Warfield, & he asks to be reimbursed the enhanced value of the property caused thereby. While the petition contains the necessary averments, there is no allusion whatever to this demand in the prayer of the petition; but since the evidence was received without objection I will consider and give effect to it, with the qualification that I do not think the plaintiff entitled to recover for the value of improvements put on the land by his vendor.

The evidence introduced to show this was objected to by the defendants, but it was received & refer-ed to its effect.

The plaintiff was awarded judgment against his warrantor, the succession of Dinkgrave, for twenty-five hundred and fifty dollars, the price of the land, & he must be supposed to have paid its value at that time. This judgment is property. It includes the
73 value of Dinkgrave's improvements and represents and stands in the stead & place of what the plaintiff paid for the property.

If the succession of Dinkgrave has not lost its right of action by its own laches, I see no reason why it should not recover its *pro rata* or proportion of the improvements.

To award these to the plaintiff would be inequitable to his warrantor.

The ameliorations and betterments contributed by B. H. Dinkgrave are an asset of his succession, and it would seem to be the duty of its executor, administrator, or other representative to reduce this asset to possession, & in that way make it available to the creditors of the succession, the plaintiff in this suit among them.

It is difficult to determine from the evidence the quantum & value of improvements for which the plaintiff is entitled to recover under the foregoing view of the case.

F. Benj. Ludeling testifies that the plaintiff cleared about ten (10) acres of land & deadened about twenty (20) acres; that the clearing of land enhances it- value about twenty dollars ($20) an acre; that it costs about one dollar — one dollar and twenty-five cents (1 to 1.25) an acre to deaden land, but that the land deadened on plaintiff's place was enhanced in value thereby from seven dollars to eight dollars an acre. This testimony is uncontradicted except by inference and implication.

To the contention of defendants that the plaintiff can only
74 recover the cost of the improvements I cannot assent.

Land deadened at a cost of one dollar an acre would doubtless, the moment after the deadening is done, be enhanced in value only one dollar an acre. But a few years later the enhancement may well and reasonably be much greater. Persons who deaden lands with the view of ultimately reducing them to cultivation, as human experience shows are accustomed to give them more or less attention from time to time and from year to year as the timber on them dies & decays & falls.

The cost of works put upon real estate by a possessor in good faith is not the measure of his right. If Judge Ludeling had erected a mansion on the place at a cost of twenty thousand dollars & had demanded reimbursement for its cost, it does no violence to reason and common sense to assume that the defendants would have been long & loud in their contention for the opposite view.

The plaintiff under the proof can only recover—

10 acres	cleared land, @ $20		200 00
20 "	deadened " @ 7		140 00
			340 00

It is shown that there were some repairs done to cabins & some ditching done on the place by the plaintiff, but I find no
75 proof in the record of the cost of this work or of the enhancement to the land resulting therefrom.

I find that the twenty-five dollars taxed as costs and complained of by the plaintiff as being curator's fees in the revival suit are properly chargeable to him. They arose in the hypothecary action.

The defendants, in their answer, allege that the issuance of the writ of injunction was unnecessary; that the plaintiff could have asserted his reserved rights by means of a third opposition without arresting the sale, & that therefore he has wantonly abused his right, pray- for five hundred dollars special damages, being attorney's fees incurred to defend the suit, & twenty per cent. on the amount of the judgment as statutory damages.

I do not concur with them in their contention that there was any wanton abuse of the writ in this case.

The plaintiff was justified in entertaining a reasonable expectation that some one of the many grounds of injunction set up by him would hold good. To say the least of it, the jurisprudence is foggy, in so far as it bears on the extent to which an assignee may

be made party to suits pending against the bankrupt, & little
76 less can be said of the decisions of the courts generally on the subject of curators *ad hoc* appointed to represent absentees.

The defendants ask, in argument, that the demand of plaintiff for betterments be compensated by his use of the property pending seizure.

A sufficient answer to this pretention is the bare suggestion that they have asked for no such relief in their pleadings.

For the foregoing reasons let there be judgment in favor of defendants dissolving the injunction, with two hundred & fifty dollars special damages & ten per centum per annum interest on the amount of the judgment enjoined & in favor of the plaintiff for three hundred and forty dollars.

The plaintiff will pay the costs of the injunction & the defendants the costs of the demand for improvements.

Done, read, & signed in open court this 18th day of May, 1888.

W. F. MILLSAPS,
Lawyer Selected to Try this Case.

77 *Motion for New Trial. Filed* 19 *May*, '88.

5 District Court, Ouachita, La.

JOHN T. LUDELING
vs.
JOHN & C. CHAFFE *et al.*

Plaintiff respectfully asks for a new trial on the grounds that the judgment in this case is contrary to the law and the evidence, and for general relief, &c.

JOHN T. LUDELING,
In Pro. Per.

Motion for Appeal. Filed 19*th May*, '88.

5 District Court, State of Louisiana, Parish of Ouachita.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.*

The plaintiff respectfully asks for a devolutive and suspensive appeal from the judgment rendered in this case to the supreme court of the State, returnable to the next term of the said court at Monroe, according to law, and pray that the amount of the bond for a devolutive and for a suspensive appeal be fixed by the court according to law.

JOHN T. LUDELING,
In Pro. Per.

78 *Note of Evidence. Filed 10th May,* 1888.

5th District Court, Parish of Ouachita, State of La.

J. T. LUDELING
vs. } No. 2382.
J. & C. CHAFFE *et al.*

Note of evidence on trial of case before W. F. Millsaps, Esq., judge *ad hoc.*

W. N. Potts.

MAY 9TH, 1888.

W. N. POTTS, Esq., sworn for plaintiff:

In the case of J. & C. Chaffe *vs.* E. W. Warfield, to revive the judgment, you appear to have acted as counsel for Mr. Atkins. Who employed you in that case?

Objected to by defendant on the ground that the validity of judicial proceedings cannot be attacked collaterally & the authority of counsel for instituting same cannot be denied except under oath, & that by the parties purporting to have employed him, and finally that the matter is irrelevant.

Objection overruled. Defendants except.

A. I don't remember who employed him. It has been a long time ago. I don't recollect whether it was directly through Mr. Atkins or other parties. It has entirely escaped my memory.

Q. Do you know whether or not Mr. Atkins was sick at that time?

A. No, sir; I do not.

Q. Don't you know he was sick a long while before he died?

79 A. I know he was sick for some while, but I don't remember.

Q. Was he not sick for a month or more?

A. I don't remember.

Q. Did you ever go to his house for him to employ you in a suit? Did he ever send for you to go there?

A. No, sir; I don't remember that he did.

Q. Who paid your fee, or were you paid a fee, unless it was paid in printing some way?

—. Mr. Atkins & I had some business matters in connection with the newspaper, but I don't remember how the fee was paid. I don't remember whether it was paid or not. I never made a charge of it. I never keep any books & don't charge up fees. I must have been employed by Mr. Atkins or some one purporting to have represented him. I certainly would not have appeared without being employed, but I don't remember whether it was through Mr. Atkins or some one else. It might have been Mr. Gayle or Mr. Gibson.

Q. Do you remember when Mrs. Warfield moved away from here?

A. No, sir; I do not.

Q. Do you remember whether she was in the parish at the time of the institution of this suit?

A. I don't remember when she moved away.

80 *A. Green.*

AUSTIN GREEN, clerk, sworn for pl'ffs:

Q. Were you appointed administrator of the succession of Mrs. Warfield?

A. Yes; I was appointed adm'r on the 8th February, 1884.

Pl'ff offers in evidence record of the suit, No. 1020, Jno. & Charles Chaffe *vs.* E. W. Warfield, suit to revive judgment, particularly the petition & appointment of A. Green, clerk or administrator of the succ'n of Mrs. E. W. Warfield, and his oath as such administrator, the oath of Mr. Stubbs & the order of Judge Richardson all in the same matter.

Offers copy of waiver of citation on the petition in the suit of Chaffe *vs.* Warfield, No. 1020.

AUSTIN GREEN recalled:

Q. Was anything done by you as administrator of that succession further than to take the oath and sign the waiver?

A. I see no order for an inventory, & do not recollect that one was made. If one was made it should be among the papers. I cannot recollect the particular acts I performed as administrator of the succession. There is no order for inventory here among the papers. I do not know whether the application for my appointment as administrator was advertised or not.

Q. Where was Mrs. Warfield when she died?

81 —. It is my recollection that she was out of the parish.

Plaintiff offers minutes of the court in the suit of J. & C. Chaffee *vs.* E. W. Warfield, No. 1020, suit to revive; offers copy of the petition & the filing thereon & the judgment in the old suit of Chaffee *vs.* Warfield, No. 1020, the petition filed September 4, 1872.

A. Green.

A. GREEN recalled for pl'tiff:

Q. Do you know whether Mrs. Warfield had any property in this parish at the time of your appointment?

A. I do not know of any she had.

W. H. Gayle.

W. H. GAYLE, called for pl'tiff, sworn:

Q. Do you remember when Mrs. Warfield died?

A. No, sir; not exactly. I think it was 1882.

Q. Where did she die?

A. I think she died somewhere in Texas.

Q. Do you remember when she moved away?
A. No, sir; I think she moved away about '79 or '80.
Q. How long had Mr. Atkins been sick when he died?
A. About a month.
Q. Was he able to attend to business?
82 A. No, sir; he didn't come out, but he was not irrational at any time that I know of. He didn't attend to business then. I know he didn't attend to the paper. He was editor of a newspaper here. He died 22nd February, '84.

J. E. McGuire.

J. E. McGUIRE sworn for pl'ff:

Q. How long have you been sheriff of this parish?
A. About nine years and tax collector for eight years.
Q. Have you collected any taxes during that time on any property assessed to Mrs. E. W. Warfield?
A. I think not.
Q. Were you acquainted with her?
A. Yes.
Q. Do you recollect when she went away from the parish & State?
A. No, sir; I think it was about '79. She died about '81 or '82. I don't know of any property she had in this parish.
Q. Do you know of any property that Mrs. Strother or Mrs. Fitz had in this parish?
A. No, sir.
Q. Who was Mrs. Strother?
A. She was a daughter of Judge Baker & granddaughter of Mrs. Warfield.
Q. Do you know whether or not she had any other heirs?
A. No, sir; no others that I know of.
83 Q. Had Mrs. Strother any property in the State after they left here?
A. No, sir.
Q. Do you recollect in what paper you advertised the Oak Grove plantation for sale when it was enjoined?
A. In the Ouachita Telegraph, I think.

(By p'ff:)

Q. Do you recollect that I instructed you to advertise it in the other paper?
A. No, sir. I always advertise in the paper I am requested to advertise in.
Q. Do you keep a copy of the paper?
A. I have a copy of the advertisement. It was advertised in the Ouachita Telegraph.

Plaintiff offers in evidence the execution enjoined and sheriff's return thereon.

Cross-examined:

—. It is stated in the petition you were instructed to advertise this property for sale in the Bulletin, & that you notwithstanding advertised it in the Telegraph. Did you receive any such instructions from defendants?

A. I do not remember having received any such instructions. It has been a long time ago. It has always been my rule to advertise in the paper designated by the defendant. I do not know of
84 any reason why I should have violated instructions in this case.

Redirect:

(By p'ff:)

Q. Do you not remember that I asked you about the time the advertisement was made why you hadn't put it in the paper I asked you to put it in?

A. I don't remember that conversation at all.

Pl'ff offers all the evidence offered on the trial of the plea of *res judicata*.

Offers copy of act of sale by Mrs. Warfield to B. H. Dinkgrave.

Objected to by the defendant on the ground that it is irrelevant & not covered by the pleadings.

Objection overruled. Defend't- excepts.

Pl'ff offers copy of act of sale from succession of B. H. Dinkgrave to J. T. Ludeling, with certificate of registry.

Objected to by the defendant on the ground last above stated.

Objection overruled. Def't- excepts.

Hon. R. W. Richardson.

Hon. R. W. Richardson sworn for pl'ff:

Q. Were you acquainted with Mrs. Warfield?

A. Yes; I was distantly connected with her.

Q. Do you know what children she had at her death?

85 A. She didn't have any child at the time of her death.

Q. What grandchildren had she?

A. Eliza Strother, wife of Dr. Strother. Mrs. Fitz died before Mrs. Warfield, and left a son.

Q. Where did Mrs. Strother reside at the time of the death of her grandmother?

A. They left here together and went to Tenn., I think. I don't remember the date. I don't recollect how long she had been gone when she died. I think she had been gone a year or two when she died. Mrs. Fitz died in St. Louis, I think. Mrs. Fitz was the daughter of Mrs. Warfield by her first husband, Sam'l Richardson.

Q. Did Mrs. Warfield go into bankruptcy before she left here?

A. Yes; Atkins was her assignee, I think.

Q. When she and her granddaughter left this State had either of them any property in this State?

A. None that I know of.

Q. You had been attorney representing some of the creditors?

A. Yes; I represented several creditors of Mrs. Warfield. I was well acquainted with the residence she owned at one time in Monroe and a plantation on Bayou de Siard. I know of no other property of hers.

(P. M.)

86 *A. Green.*

A. GREEN recalled for plaintiffs:

—. Was there any advertisement of the application for the appointment of R. G. Cobb as curator for absent heirs in the succession of Mrs. E. W. Warfield?

A. I cannot be positive, but I don't think there was. I don't think he took any oath as curator. I don't think any inventory was made.

C. J. Boatner.

C. J. BOATNER, Esq., sworn for pl'tiffs:

Q. Were you employed to prosecute the suit in the hypothecary action of J. & C. Chaffe *vs.* J. T. Ludeling, No. 1668?

Objected to by defendants on the ground that the terms of the employment of counsel for the prosecution of the case referred to or of this case are irrelevant and not pertinent to any any issue in the cause.

Objection sustained. Pl'ff excepts.

Q. Who employed you?

Objected to on the grounds above stated.

Objection sustained. Pl'ff excepts.

Pl'ff offers the testimony of K. Leow, taken by commission.

Objected to by defendants on the ground that it is in relation to the subject-matter embraced and coupled in the plea of *res*
87 *judicata* & estoppel, & therefore is inadmissible under the pleadings in this case.

Objection overruled. Def'ts except.

F. B. Ludeling.

F. B. LUDELING sworn for plaintiffs:

Q. Are you acquainted with the No. of sec. 1, T. 17, R. 4 E.?

A. Yes.

Q. Do you know what improvements have been made on that part of the tract since B. H. Dinkgrave acquired it?

Defendants object to the proof of any improvements made by any one except the plaintiff in the case on the ground that there is no law authorizing him to recover the value of any improvements made by any previous owner of the property, and on the further ground that according to the terms of the judgment rendered in

the case of Chaffe against Ludeling only the value of the improvements made by J. T. Ludeling were reserved & J. T. Ludeling obtained judgment in warranty against the estate of Dinkgrave, there being no reservation in said judgment in favor of the estate of Dingrave, & that said J. T. Ludeling is without right of authority to recover on any demand in favor of the estate of Dinkgrave.

88 Objection overruled. Def'ts excepts.

A. Yes.

Q. State them.

A. There has been two cabins built and about 40 acres of land cleared up and about 60 acres of land deadened and some ditches cut—three ditches. There were two cotton-houses & a small stable built, & a fence has been put up around 40 acres at least.

Q. What is the condition of the cleared land?

A. It is in a good state of cultivation.

Q. What is the condition of the deadened land?

A. Most of it has been deadened 4 or 5 years; some 6 years, I expect. Almost all the big timber has fallen. There is some undergrowth on it.

Q. How much has the improvement put on the land enhanced the value of the cleared land?

A. I should think about $25 per acre.

Q. How much has the deadening of the 60 acres spoken of enhanced the value of the land?

A. About seven or eight dollars per acre.

Cross-examined:

Q. How much of this clearing and deadening referred to was done before Judge Ludeling became the owner of the property?

89 A. Nearly all of it was in cultivation, but not in a thorough state of cultivation when he bought it.

Q. Then none of it has been cleared by Judge Ludeling since he acquired the property?

A. Yes; some of it; I suppose in the neighborhood of five or six acres of it; I expect ten acres, in straightening the ends of rows, and then there were some thickets that he cleared. I think about ten acres would be the limit of the amount cleared by him. The greater part of the deadening has been done by him. I have paid for the greater part of it for him.

Q. How long since that deadening was done—what year?

A. I think some of it was done the year after he bought it and some the year after that. There was some deadening when he bought it. I think about 60 acres have been deadened.

Q. What proportion of that was deadened at the time he bought it?

A. I don't know. I don't think as much as half of it; possibly as much as $\frac{1}{3}$ of it—between a quarter and a third.

Q. What is the character of that land—the deadened land?

A. It overflows in every high water.

90 Q. You say that land has been improved in value?

A. Yes; about seven or eight dollars per acre. I don't know what that land would sell for; it ought to be worth 12 or 15 dollars per acre.

Q. Have you known any land to sell for any such price in the last few years?

A. I gave pretty nearly that much for a peice I bought from Mrs. Scarborough this spring. I gave $2,000, and I think there was 140-odd acres; about 50 cleared. The most of it was in the woods.

Q. Have you known any deadened land to be sold for such price?

A. I don't know of any deadened land to have been sold at all separate from cleared land.

Q. What do you estimate the value of the land that has been cleared?

A. It ought to be about 30 dollars per acre.

Q. You estimate the increased value at 5% of the land?

A. Yes.

Q. What is the annual rental value of the Oak Grove plantation?

A. We have never rented it since we have owned it that I remember of. Such lands as that rent for about 4 or 5 dollars per acre.

91 Q. How many acres of open land in the N. ½ of sec. one?

A. I suppose there is one hundred acres of it.

Q. You are related to the plaintiff in this case?

A. Yes; I am his son.

Q. Are these two houses you refer to built on the land in controversy in this case?

A. Yes, sir.

Q. Who built those houses?

A. They were built before Judge Ludeling became owner of the property. We built a new chimney and repaired others. They are made of lumber—box houses, with two rooms—one a large and one a small room. I don't know when they were built; they were there when I first knew the place.

Q. How many years ago has that been?

A. I suppose it is eight or nine years ago; in '77 or '78.

Q. Was the 40 acres of cleared land on the land in controversy in this case?

A. Yes; I think so.

Q. Have you ever measured that land?

A. Not all of it; only portions of it, as we were having it deadened.

Q. How much would it cost to put that land in its present condition? How much would it cost to clear it?

92 A. It could be cut down and cleared and put in condition so it could be plowed for about 5 dollars per acre; then it would not be in full cultivation for two or three years.

Q. How much would it cost to deaden that land?

A. I think we paid $1.00 per acre; $1.25 for some.

Q. What is the condition of those houses you refer to?

A. They are in pretty fair condition; one of the chimneys was

built last year & one house repaired this spring. We have had people in one of them all of the time, and one occupied off and on, until this year it was occupied all the time.

Q. Has not the plaintiff been cultivating and enjoying the revenues of the property in controversy since the institution of this suit?

A. Yes; he has been cultivating it on shares with the hands. It is my recollection I paid $1 or $1.25 per acre for deadening that land.

Q. How much did you pay for the ten acres in the field?

A. It is impossible to say; it was done at different times by day labor. I cannot form any idea of what it cost.

Q. How do you know Mr. Dinkgrave cleared 40 or 60 acres of land there?

93 A. I know it as I know any other fact in the history of the country. I did not see it done. I only know it from what I was told after my father bought the property. My knowledge about the deadening Dinkgrave had done was from what I have heard. I know he was having deadening done, and I was on the land frequently and know it as well as any fact of local history. I don't know whether the land was deadened at the time Mr. Dinkgrave acquired the property. There are trees standing on it now.

Q. Were you not off at school during the years 1875, '76, and '77?

A. Yes; I was off, but generally came back during the vacation. I came home in '77, I think.

Q. You have no accurate knowledge of the extent of land cleared by Mr. Dinkgrave, and don't know of your own knowledge that he cleared any?

A. I don't know of my own knowledge. I never saw him have any cleared.

Redirect examination:

Q. You stated that trees could be cut and piled for 5 dollars. What do you mean by that?

A. I meant the undergrowth and briars, &c. I did not mean the forest trees.

Q. Have you had any experience in clearing lands on the
94 adjoining plantation?

A. Yes.

Q. What would it cost, what is the fair average cost, for clearing such land as is on the Oak Grove place?

A. My experience is that it cost a great deal. I don't think twenty dollars per acre would be too high.

Q. Who cut the ditches there on the land spoken of?

A. They have been cut since Judge Ludeling bought the place; cut by the negroes on the place, & I paid for part of them for plaintiff, & he paid part of them himself.

Q. I think you said lands deadened and in the condition these 60 acres were was worth 12 or 15 dollars per acre?

A. Yes; when I said lands were worth 12 or 15 dollars per acre I referred to land that had been deadened.

Q. Do you know what these cleared lands were assessed at?

A. Twenty or twenty-five dollars per acre.

J. T. Ludeling.

J. T. LUDELING, sworn in his own behalf, says:

Mrs. E. W. Warfield left the parish of Ouachita and State of La. permanently in the fall of '79. I think she and her granddaughter, Mrs. Strother, went to live in Tennessee. Mrs. Warfield died
95 in Tenn., where she was living at the time, on or about the 1st of February, '81. Mrs. Warfield had a daughter, Mrs. Martha Fitz. Mrs. Fitz died before her mother. Mrs. Fitz had a son living after the death of Mrs. Warfield, who lived in St. Louis, and was living there at the time of the institution of this suit. Mrs. Strother was living in Tenn. at the date of the institution of this suit.

Mrs. Warfield had no property in the parish of Ouachita when she died, to the best of my knowledge and belief, unless the sales to Chaffe were illegal. She went into bankruptcy some considerable time before she left the State. Dr. B. H. Dinkgrave bought the N. ½ of sec. 1, T. 17, R. 4 east, in 1875. At his succession sale I bought said lands. Since his purchase in '75 and my purchase from him he and I have been in actual and undisturbed possession of the property and have made large and valuable improvements on said land. We have had about 40 acres thereof cleared and put in cultivation; I state in my petition fifty acres, and that was my estimate until my son made a measurement and said, as in his testimony, that it was less. I have had upwards of 60 acres deadened several years ago; I said in my petition about 80 acres, and I am of
96 that opinion still, though I have not measured it. On the cleared land there are two cabins, outhouses, a well, and fences. Said lands have been ditched also. I think the enhanced value of the land caused by the improvements put upon said land is about 30 dollars per acre for the cleared land and from 7 to 8 dollars on the lands which have been deadened. At different times fire has been put in the deadening and the cane and undergrowth and the trees which had fallen to a considerable extent burned. The conversation detailed in the petition for injunction occurred as stated therein and is true and correct. When the sheriff served notice of seizure in this case I directed him to advertise the property in the Monroe Bulletin, a newspaper published in Ouachita parish, but he did not do so, and advertised the sale in the Telegraph. To the best of my knowledge and belief I have been damaged by the seizure in this case in the manner stated in the petition and amended petition.

Cross-examined:

Q. What do you estimate the attorney's fee is worth for dissolving the injunction in this case?

A. I suppose $500.00.

97 Q. How much land did you clear after you bought the place in controversy?

A. I can't say, for I have never measured it. There was very little deadening done on the piece that was cleared by Mr. Dinkgrave & myself, about which my son has testified as being about 40 acres when I bought it. It had been deadened and had been cultivated by my son for one or two years, but was in a very incomplete state of cultivation. The trees were standing deadened and the underbrush to some extent cut down, but it was a very small portion of the clearing to put it in the condition it is in now.

Q. Did you pay out any money for the conditional clearing of the land which you refer to as having been in cultivation for two years?

A. Yes; I can't say how much was paid out. Money was paid out by the day for rolling logs & ditching & clearing generally. Trees were constantly falling & were burned.

Q. Is not the use of the land after it is in that condition fully equal to any expense incurred?

A. I cannot say that it is. I do not think the rent of lands would compensate for the expenses incident to putting it in a thorough state of cultivation the second year.

98 Q. As a matter of fact, does not the labor that is employed in the cultivation of land in that condition, either as tenants or as share hands, cut down and burn such timber as falls as part of their contract & labor which they undertake on the place?

A. No, sir; not on my place; not on lands in that condition.

Q. You are unable to state how much you paid out for the clearing of this land?

A. No; I have no memorandum, but I don't believe that lands of that character can be cleared for what my son says they can be. I believe it cannot be done for less than $30 per acre. I believe a large portion of the lands I have cleared on my Killoden place, which I have cleared, has cost me over 30 dollars per acre.

Q. How far south of the railroad is it to the north line of the land in controversy?

A. There is an oak that stands in the lane about opposite the fence on the old King place, which is the N.W. corner of sec. 1, and this land commences at that point. I can't state, but I will say this land commences 200 or 300 yards south of the railroad. I have never measured it, and never had my attention specially directed to it.

99 Q. About how much cleared land — included in this sale to you by Mr. Dinkgrave in excess of the land in controversy in this case?

A. The deeds will show. I suppose about 40 or 50 acres. I am only approximating.

Q. Are not almost all the valuable improvements on that part of it?

A. The greater number of the cabins are.

Q. What was the relative value of the land in controversy and those not embraced?

A. I don't know that there was much difference. Part of the land

on sec. 36 south of the railroad is little lower and subject to overflow from a southeasterly direction than the other.

Q. Are not all the buildings and improvements on the plantation of this land in controversy except the two houses Bay Ludeling has referred to.

A. They are, with the exception of the outhouses I have mentioned; but there are no other improvements on the land in sec. 36 except cabins and one small corn crib and a stable, which have been put there in the last two or three years.

Defendants offer in evidence the release bond executed by J. T. Ludeling with Mrs. Morgan as security in the case of Chaffe *vs.* Ludeling.

J. T. LUDELING recalled in his own behalf:

100 I will correct my statement as to a fair fee for dissolving the injunction in this case by saying it is worth $250, as I allege in my petition. It is worth ten per cent. That is what I charge in my practice.

Defendants offer in evidence record of the suit of Jno. & Chas. Chaffe *vs.* J. T. Ludeling, No. 1668, petition, answer, judgment, mandate of the supreme court and mandate of the circuit court, and all the pleadings, orders, and decrees of the courts; offer copy of the judgment, together with the certificate of inscription and reinscription on the mortgage book in the case of J. & C. Chaffe *vs.* Mrs. E. W. Warfield, No. 1020.

Offers the record in the case No. 1020, together with the citation to W. T. Atkins, assignee, and sheriff's return thereof, and the answer of A. Green, administrator; answer of W. T. Atkins, assignee; answer of R. G. Cobb, *curator ad hoc*, together with the judgment of certificate of inscription in the mortgage book.

F. P. Stubbs.

F. P. STUBBS, Esq., sworn for defence:

Q. Are you acquainted with the property in controversy in this case?

A. Yes; I have frequently passed it; don't know that I was ever on the land. I know the plantation immediately west
101 of it.

Q. How does the land you own compare with the land in controversy with the respect of fertility and improvements?

A. I believe it is something higher; never having been on the the land in controversy, but only seen it. The place I speak of, the old King place, was principally a gum ridge, but a part of it, I think, the same as the land in controversy; that lying nearest the the land in controversy is very near the same character of land.

Q. How long since you acquired that property?

A. About four or five months.

Q. How much did you give for it—how does the price average per acre?

A. I paid about $7.00 per acre; there is 1,350 acres in the tract, 500 cleared, 21 cabins, good steam gin and steam press, a fair dwelling for a farm, the stable is indifferent, it is well ditched, and the fences are generally in good condition. I gave ten thousand dollars for the place and nine mules. I think there is between 1,300 and 1,400 acres.

Q. State what is the assessed value of the wood land, such as that purchased by you, belonging to the King place.

102 A. Up to two years ago the rule for assessment on the Bayou de Siard, I believe, & river lands was 20 dollars per acre, including improvements, and the wood land at 2 dollars & 5 dollars, according to quality. In the last two years the assessor put down the cleared land 15 dollars per acre; that is the rule for bayou lands in this parish.

Q. Estimating your wood land at five dollars per acre, how much did you pay for the cleared land?

A. About ten dollars per acre, including improvements, buildings, &c.

Q. State whether you have been engaged in planting for some years; and, if so, how long?

A. Yes; for not more than twenty years, I suppose.

Q. About —, in your experience, is the cost of putting land in a complete state of cultivation after it has been fenced, deadened, and cleared sufficiently to be cultivated two years?

A. It is incidental to the work then necessary, rolling logs and clearing ditches, which are incidental to the cultivation itself.

Q. State whether or not the use of that land in that condition would be sufficient compensation for any expenses that might be incurred in clearing or felling the timber & putting up fences.

103 A. Yes; it would more than compensate for it.

Cross-examined.

Q. Have you rented land to others?

A. Yes; I rent lands. For some very choice lands, with the houses and privileges, on the island I get eighty pounds of lint cotton per acre. Then I believe I have got one tenant who pays me five dollars per acre money rent on the island.

Q. Do you know what rental has been paid on the King place before he bought it?

A. No; I do not know.

Q. Do you know what your vendor gave for that place; the King place?

A. Nominally he paid some $20,000, but he bought some mortgage notes on the property; that was about five or six years ago.

Q. Do you know what King gave to Meyer, Weis & Co. for that place?

A. No; I do not.

Plaintiff offers certified copy of the deed of the King place that Mr. Stubbs bought from J. Weis to King, & also the deed to Rosenfield of the same place.

Redirect:

Q. State whether or not the sale from Rosenfield to you was a forced or voluntary sale.

104 A. No; it was a private transaction.

Defendants offer deed from Rosenfield to F. P. Stubbs, about which has been testified.

Def't closes.

Judge Ludeling.

10TH MAY.

Judge LUDELING, recalled in his own behalf, says:

Dr. Strother died before Mrs. Warfield and Mrs. Strother. The doctor's wife moved away from the State.

Plaintiff proposes to prove that the estate of B. H. Dinkgrave was and is insolvent, and that he (p'ff) has not collected and has no possibility of collecting any part of the judgment rendered in favor of Ludeling against the estate of Dinkgrave called in warranty; to which proposed evidence defendants object on the ground that it is not relevant to any issue in the case and not covered by the pleadings and is not in rebuttal of anything proved by defendant.

Objection sustained. Testimony excluded. Plaintiff excepts.

I certify that the above and foregoing is all the evidence adduced in the trial of said cause of J. T. Ludeling *vs.* J. & C. Chaffe *et al.*, No. 2382.

Witness my official signature this 10th May, 1888.

AUSTIN GREEN, *Clerk.*

105 1668. *Note of Evidence.* *Filed 26th Apr'l*, 1882.

STATE OF LOUISIANA:

5th District Court, Parish of Ouachita.

JOHN & CHARLES CHAFFE *vs.* JNO. T. LUDELING. } No. 1668.

Before W. N. Potts, Esq., lawyer selected and appointed; Hon'l. R. W. Richardson, judge, recused.

Note of evidence.

Appearances: F. P. Stubbs, Boatner & Liddell, & Talbot Stillman, Esq., for pl'tiffs.

John T. Ludeling in person.

J. H. Dinkgrave, Esqr., for warrantor Dinkgrave.

R. Ray, Esqr., for warrantor Strother.

Plaintiff's Evidence.

1st. Pl'tiff offers certified copy of the judgment in the case No. 1020, Jno. & Chas. Chaffe *vs.* E. W. Warfield & W. J. Q. Baker, with certificate of record and partial release thereon.

Defendant objects to the certificate of the partial release on the ground that it is not the best evidence, and that it is not such a certificate as the recorder is authorized by law to give, and that it is irrelevant; which objections were overruled by the court
106 on the ground that it is admissible to prove *rem ipsam* that there was such an inscription in the books; to which ruling defendant excepts & reserves this bill.

After this ruling, when the pl'ff's counsel read what was called a certificate of the recordation, defendant objected on the ground that this was not a certificate of the recordation and was a certificate to a certificate; which objections were overruled by the court; to which defendant excepts.

(By the COURT:) This copy of judgment, with certificate thereon, had been handed to defendant, & at that time an objection was made to the certificate of cancellation, but none made to what was called the certificate of record of the judgment, and when this was being read to the court defendant objected that it was not what it was called in the first instance.

These proceedings were continuous and all happened in a few moments.

2nd. Pl'ff offers certified copy of the judgment in the same case, made by Julius Ennenroser, clerk, with the certificate *with the certificate* of record by M. M. Grady.

J. E. MCGUIRE, sworn for plaintiff, says: I have examined the demand attached to the amended petition in this case. It had been in my possession, & I made the endorsements on that de-
107 mand. When I made that endorsement I had a duplicate of the document. I did not compare it word for word, but I know I had a duplicate of it.

Q. What did you do with the duplicate of that paper that you had?

Objected to on the ground that the sh'ff cannot testify orally as to what he did; that his return is the best evidence. Objection overruled by the court; to which ruling defendant excepts.

A. I served that document on Judge Ludeling; I made the service 15 December, '80.

Cross-examined:

I thought I was acting as sheriff when I served that paper. I handed the paper to Judge Ludeling & signed my return as sheriff. I was sheriff of the parish at that time. I made my return on the paper.

3rd. Plaintiff offers the demand made on defendant about which J. E. McGuire has testified, dated 13th Dec., 1880.

Objected to by defendant on the ground that it does not correspond with the allegations in the original petition, & is inadmissible; which objections were overruled; to which ruling defendant excepts.

4th. Offers certified copy of act of sale by Mrs. E. W. Warfield to B. H. Dinkgrave, passed 30th June, 1875, with certificate of
108 record on pages 370 & 371 of Notarial Book "V."

Objected to on the ground that the evidence does not correspond with the allegations of the petition; that it is inadmissible under the pleadings & is irrelevant. Objections overruled by the court; to which defendant excepts.

H. H. RUSSELL, sworn by pl'tiff, says:

I have examined the paper presented to me, which purports to be the demand upon W. T. Atkins, assignee of Mrs. E. W. Warfield.

I made the copy of this demand addressed to W. T. Atkins, assignee, &c., from a duplicate original of the same, and handed it to Mr. Atkins on 6th November, 1880.

The endorsement on that demand was written & signed by me at that time.

5th. Pl'ffs offers said demand on W. T. Atkins, assignee of Mrs. E. W. Warfield.

6th. Pl'ffs offer the record of the case No. 1231, entitled E. W. Warfield *vs.* G. B. Hamlet, sheriff, *et al.*, consisting of the petition & affidavit to the same—date, 3rd March, 1875; order for injunction, of same date; writ, with sheriff's return; citation and returns, answer, verdict, and judgment, petition and order of appeal & certificate of non-appeal by the clerk of the Supreme Court & its filing in the clerk's office on 8th August, 1875.

All of which was objected to on the ground that it is *res*
109 *inter alios acta* and irrelevant; which objections were sustained by the court, & to which ruling plaintiffs except.

By the COURT: It was stated by the counsel offering the evidence that it was properly in rebuttal of the allegations in the answer.

The court in sustaining the objection stated that at this stage of the trial the pl'ffs should confine his evidence to the allegations of the petition.

AUSTIN GREEN sworn for pl'ffs: I am clerk of this court. I have been in charge of the records of this office since September, 1877. I went into the office as deputy in September, 1877, & was appointed clerk in Jan'y, 1878.

I have made search for the papers in the case No. 1020, Jno. & Charles Chaffe *vs.* E. W. Warfield, in the last two or three years. I have made diligent search among the records of the office & have also inquired at different law offices in town for them. I have not been able to find them.

I have not been able to find the original petition or the judgment in that case.

I do not remember to have ever seen those papers at all.

Cross-examined :

I do not think I have ever seen those papers since I have been in the office.

P. S.—Since testifying as above I have found the missing
110 record referred to while looking for other records in my office.

W. T. ATKINS, sworn for plaintiff, says :

I was assignee of Mrs. E. W. Warfield's bankrupt estate. I have not got a copy of her schedule in bankruptcy.

Mrs. Warfield's bankrupt papers were in charge of W. J. Q. Baker, who was register in bankruptcy. Mr. Baker was Mrs. Warfield's son-in-law. His office was in Morrison & Farmer's old office. I can't say who has charge of these records. Mr. Baker died, and they are in the office yet, the greater portion of them ; I mean the general bankruptcy papers.

Mr. Baker died in the summer of 1880—July or August. I have never had charge of those papers except to refer to them in the office.

Cross-examined:

Dr. Strother died, I think, in the fall of '79, some months before Judge Baker died. I think Ben. Dinkgrave died the last of July, 1876.

Mrs. Warfield died some time last year in Tennessee.

Plaintiff closes.

Defendant offers in evidence—

1st. The testimony of J. E. Hanna, taken before the clerk.

To the introduction of which pl'tiffs object on the ground
111 that it is *heresay* evidence and irrelevant to the issues in this case, and for the further reason that parol evidence is inadmissible against or beyond what is contained in the written act, nor what may have been said before or at the time, nor since the making of the act, and that it purports to be conversations and statements made out of the presence of Mrs. Warfield & of the pl'ffs in this case.

Which objections as to the statement of B. H. Dinkgrave, testified to by the witness, were sustained, & that part of the testimony excluded. The other objections were overruled ; to which ruling plaintiffs except and reserve this bill of exceptions.

The defendant excepts to that part of the ruling excluding the statement of B. H. Dinkgrave, and reserves this bill of exceptions, and the defendant further excepts to the permitting other objections to be made in court than those made in writing at the time the testimony was taken in the clerk's office.

Hon. R. W. RICHARDSON, sworn for defend't, says: I was attorney for the plaintiffs in the suit of Oliver & Byrne, L. D. McLain, execu-

tor, *et al.*, & Miltenberger & Co., & J. W. Merrell *vs.* Mrs. E. W. Warfield.

On those executions I think a seizure was first made of
112 what was known as the Oak Grove plantation. There were one or more injunctions, and discovering that there was a large amount of taxes due, as I believed, nearly approximating the value of the property, I caused the further seizure to be made of that portion of the Bon-air plantation belonging to Mrs. Warfield. Some of these injunction suits may have been after this additional seizure. Previous to the sale of the property the seizure of the Oak Grove place was released upon being satisfied by Mr. Dinkgrave that the taxes due by Mrs. Warfield had been or would be paid.

I proceeded to sell the Bon-air place, & these taxes were not demanded & I am satisfied they were arranged by the collector.

Defendant offers—

2nd. The testimony of Steve Wood, taken before the clerk.

Objected to by plaintiff in the ground that the testimony is irrelevant, & that it is inadmissible for one of the deputies to contradict the sheriff's return; that the she-ff's return cannot be contradicted in this collateral proceeding; that the validity of the sale of the Bon-air plantation to Jno. & Charles Chaffe cannot be attacked collaterally in this way.

Objects to all that portion of the testimony which is heresay, and objects to all that part of the testimony which speaks of the
113 political disturbances of the country as being irrelevant and inadmissible under the pleadings. Objects to the introduction of the testimony by defendant on the ground of his being privy to the act of sale from Mrs. Warfield to Dinkgrave; that he is estopped from denying that there was any seizure of the Bon-air plantation by reason of her judicial admissions & allegations in the suit No. 1231 on the docket of the 14th dist. court of this parish, entitled E. W. Warfield *vs.* G. B. Hamlet, sh'ff, *et al.*, filed 20th April, '75.

Defendant objects to any objection- by plaintiff being made now that were not made in writing before the clerk at the time the testimony was taken.

The plaintiffs object further to the introduction of this testimony on the ground that default having been taken in this case before answer filed that any evidence to support the plea of discussion is inadmissible for the reason that the plea comes too late.

Warrantor Dinkgrave objects to any further objections being made on the part of plaintiff than those first made, for the reason that argument had been had on both sides upon the objections first made, & the closing argument on those objections was about to be made, & that the objection came too late.

114 Which objections by warrantor were overruled, the court stating that pl'tiff could make his additional objections, & that defendant could discuss them if he wanted to; to which ruling warrantor excepts.

The objections to the testimony of Steve Wood were overruled; to which ruling pl'ff excepts & retains this bill of exceptions.

Def'f't offers—

3rd. The testimony of M. F. Parker, C. H. Calhoun, and S. Whited, taken before the clerk.

Objected to by pl'tiff on the ground that in so far as is sought to sustain the plea of discussion, the plea, being dilatory, should have been plead *in limine*, not having been filed till two days after default, and then in the answer, it is too late, and no evidence is admissible to sustain it.

If not a dilatory exception it was waived by defendant going to trial without having it disposed, and therefore no evidence is admissible to sustain it; that the sheriff's return on the writ executed by him cannot be contradicted without proper allegation and in a direct action of nullity; that the sh'ff's deed cannot be attacked collaterally nor contradicted by parol evidence or otherwise.

115 Plaintiff objects, further, that parol evidence is inadmissible to prove that the sheriff announced other terms or particulars of sale different from those advertised officially by him; that it is hearsay, and in so far as it gives conversation of any and all persons is inadmissible;

That it is irrelevant; that it is inadmissible for the sheriff or his deputy to contradict by parol their official acts.

This last objection is made especially to the testimony of S. Whited.

All of which objections were overruled by the court and the testimony admitted; to which ruling pl'ffs except and retain this bill of exceptions.

FRANKLIN GARRETT, Esqr., sworn for defend't, says:

The law firm of which I was a member was the legal adviser of G. B. Hamlet, sh'ff. It has been so long I do not recollect the titles of the cases against Mrs. Warfield upon which executions issued in '76.

I think Miltenberger & Co. and Merrell, L. D. McLain, ex'r, *et al.* and Oliver & Byrne *vs.* E. W. Warfield were the cases. I don't know of others of that kind at that time.

Hamlet, sheriff, consulted me in regard to the sales under those executions in 1876.

Q. Do you know the cause or the reason why he consulted you on that occasion?

A. Yes.

Q. State those reasons.

116 Which was objected to by plaintiff on the ground that it is hearsay evidence, as being the unsworn declaration of third persons, and that such testimony is irrelevant to the issues involved in this case; that no evidence is admissible under the plea of discussion, for the reasons that it was waived by going to trial without having the plea disposed of; that the plea came too late, having been filed after answering to the merits and after judgment by default; and objects further for the reasons stated in the objections to the testimony of Wood, Parker, Calhoun, and Whited.

These objections are retained to all the testimony of Mr. Garrett and which he may hereafter give.

Which objections were overruled by the court; to which pl'tiffs except and retain this bill of exceptions.

A. It was on the morning, I think, of the day for which the sale was advertised that Mr. S. Whited handed me an instrument in writing entitled, I think, the certificate of protection from the bankrupt court in the case of the bankruptcy of Mrs. E. W. Warfield, requesting my advice as to his further action as deputy sheriff in reference to the sales advertised to take place that day. I told him
117 that while I was not certain that the document presented was sufficient in law to interfere in any way with his proceedings as deputy sheriff, yet, as he represented the principal, Hamlet, who was absent, the best plan would be to demand a bond of indemnity before making sale. He left and subsequently returned, stating that the bond of indemnity was refused. I am not positive, but think I either called upon Judge Richardson or Col. Morrison, maybe both, in company with S. Whited, in reference to the bond of indemnity, which was again refused. I then advised Mr. Whited to be particular in making the sale—to announce that he sold only the interest of Mrs. Warfield in the property as whatever it might be on that day.

Plaintiffs object further that it is inadmissible to prove advice to the sheriff to vary the terms of the sale than those advertised, and that it is an attempt to contradict by parol the sheriff's deed.

Which objection was overruled by the court; to which pl'ff excepts an- retain this bill of exceptions.

Witness continues: I particularly enjoined upon Mr. Whited to sign no sheriff's deed until it had been submitted to me, in order that the clause referred to of only selling the right of Mrs. Warfield should be incorporated in the deed and also the return. I am not
118 sure, but think I was present at the sale. I could not say that the deputy sheriff followed my instructions at the sale. I do not know that I was here when the announcement was made. I was probably here in another matter. I think the instructions were obeyed for the reason of a subsequent conversation with Mr. Whited after the sale, in which I renewed my advice to him to submit the sheriff's deed and the return before signing it. So far as I remember, I have never seen either deed or sheriff's return. It is a fact that the sheriff's deed was not submitted to me before signing.

On Monday or Tuesday succeeding the day of sale I asked Mr. Whited if he had prepared the deed or written his return.

Defendant offers in evidence—

4th. The testimony of Ben. Woodward and W. J. Q. Baker, taken before Samuel McEnery & F. A. Hall, commissioners, under commission issued out of the U. S. dist. court in the eastern district of Louisiana in the case of W. T. Atkins, assignee, *vs.* Jno. & Chas. Chaffe.

Plaintiffs make the same objections to this testimony as were made to the testimony of Parker, Calhoun, Whited, and Wood, and make the further objection that it is only a part of a record & is
119 not a whole; that it is only a portion of that testimony taken in that case, & it was in a matter pending between other parties & the plaintiffs in this case, and to which the defandant in that case was not a party.

Objections sustained and the testimony excluded, with permission of the court to the party to attach this testimony to his bill of exceptions. (See separate bill of exceptions retained by defendant.)

Defendant offers—

5th. The testimony of Ben. Woodward and R. C. Strother, taken in the suit of E. W. Warfield *vs.* Calhoun & Parker, No. 1305.

Plaintiffs make the same objection to this as were made to the testimony of Whited, Wood, Parker, & others, and the additional objection that this testimony was taken and received in a case to which plaintiffs were not parties, and did not therefore have the privilege to cross-examine the witnesses; and they make the further objection that it is a portion of the record in that case only, and that if any portion of the record is offered a portion is not admissible without the whole.

120 Objection sustained & the evidence excluded; to which ruling defendant excepts and retains the bill of exceptions, with permission to attach the testimony offered to his bill of exceptions.

A. GREEN recalled for defendant:

I am clerk of this court. I do not know where the original sheriff's deed to Jno. & Chas. Chaffe of the Bon-air property, made in Sept. '76, is. It cannot be found either in the clerk's office or recorder's office, said deed being signed by S. W. Wood and witnessed by Talbot, Stillman, & H. Moise. That is the deed which I say cannot be found. I have no idea who has taken it.

Defendant offers—

6th. Sheriff's deed to John & Chas. Chaffe of the Bon-air property, made in Sept., 1876, in Notarial Book W, commencing on — page of said book (copy to be furnished).

Objected to by plaintiff on the ground that no evidence under the plea of discussion is admissible; that it comes to late; that the plea itself having been filed after default taken, that came too late, & no evidence can be offered under it, and this is in the nature of discussion, pointing out a piece of property to be discussed which is not in the possession of the defendant or of the original debtor,
121 Mrs. Warfield, and for the further reason that the property pointed out is not shown to be in possession of the defendant.

Objections overruled; to which ruling the plaintiffs excepts & retain this bill of exceptions. (At this stage of the proceedings the defendant asked that all the foregoing testimony be considered as applying equally to the defendant and the warrantors both; to

which the court stated that he had been considering it as introduced by both and had been so ruling, and that he applied the objections to testimony as introduced by defendant and warrantors.)

Defendant and warrantors offer—

7th. The warranty of Mrs. E. L. Strother, written on the same sheet of paper on which the deed from Mrs. E. W. Warfield to B. H. Dinkgrave is written, dated same date, 30th June, 1875, and attested by L. F. Laney and Jas. S. Ray.

ROB'T RAY, Esq., sworn by defendant and warrantors:

I was acquainted with Mrs. Warfield in '74, '75, & '76. Her affairs were in an embarrassed condition. There were judgments being obtained against her. Suits were filed against her about that time by different parties. These suits, upon which executions issued and under which the Bon-air place was sold, were ob-
122 tained against her during those years. I think there was another suit of Gerson against her for about $1,200, and I think there was a suit filed about that time, of Mrs. Strother *vs.* her grandmother, Mrs. Warfield.

J. S. SANDERS, sworn for def't & warrantors:

I am acquainted with the Bon-air plantation. I know the lower part, that belonged to Mrs. Warfield.

Q. What was the value of the cleared land on that part of Bon-air belonging to Mrs. Warfield in 1876?

Objected to by the plaintiff on the ground that, the plea of discussion by defendant having been filed after default and in his answer, it came too late & no evidence is admissible thereunder, & for the further reason that no property can be pointed out under the plea of discussion, except that which is in the possession of the original debtor; that it is attacking collaterally pl'tiffs' title, which defendant & warrantors already offered in evidence and without making the pl'ffs in execution, under which pl'tiffs in this case acquired the property, and the present possessors of the property parties to the litigation.

Which objection was overruled.

To which ruling pl'tiffs except & reserve bill of exception.

123 A. The value of that cleared land then, as near as I can fix it, was $25 per acre.

There are different qualities of the wood land. There is some near the railroad, which is worth about ten dollars per acre, & there is some that is worth but little.

The railroad crosses that wood land part of it. That part of the wood land north of the railroad is as good land as there is on Bayou de Siard. I can't say there is good timber on it. It was good wood land originally, but there has been a good deal of clearing on it. There is a clearing north of the railroad; right on the R. R.

Cross-examined by pl'tiffs:

I know about where the front division line between Mrs. Strother and Mrs. Warfield is. I don't know where the back division line is. I do not know that the clearing spoken of was on Mrs. Strother's land. I was under the impression that it was on the Warfield tract. It is on the land that Parker now owns. My estimate of the value of that land was based on the understanding that Mrs. Warfield's land was the land that Parker now owns. Mrs. Warfield's part of it was what is now known as "Kansas," and not the Parker tract.

I believe Mr. Breard is now in possession of the Warfield
124 part of the tract. I believe this is the third or fourth year he has been in possession of it. At the time Chaffe bought the Warfield tract I believe there was a log cabin on it, on the north of the road. I do not believe there was any other building on it then. There was a fence on the north of the road at that time. There were no improvements on the south of the road but the fences and the cleared land. There was a side fence on the place in '76; not a good fence.

It was a poor rail fence. There was a lane there then. The residence and the tenement buildings are all on the Strother part of the Bon-air place, except the one cabin I have mentioned.

The buildings on the Strother part of the Bon-air enhanced the value of it some, but the buildings were very inferior.

Q. Do you know how much accom-odation there was on that place for labor, whether there was enough to accom-odate 75 hands?

A. I cannot say. There was nothing of value on the Warfield part of Bon-air except the cabin mentioned and the cleared land. There is about 20 acres of front land on the Warfield place that is somewhat inferior, but I do not think the difference is very great. My estimate was based on what I heard of the value of the place.

There is some inferior land on the front of the place. I did
125 not want to buy the land, because I could not sell it.

There were no buyers or sellers at that time. I could not say what was the cash value of the Warfield part of Bon-air in '76. I think that land ought to have been worth $25 per acre if it had been in the market for sale with an unincumbered title. I speak of the cleared land. There was no land sold on Bayou de Siard for $25 per acre at that time that I know of.

There was a good deal of difference between the value of the Warfield part of Bon-air and the Ingleside place, adjoining on the west, in 1876. I expect the buildings on the Richardson or Ingleside tract were worth five or six thousand dollars; the buildings, gin-house, and cabins.

I believe Meyer paid $14,000 or $16,000 for it and a mortgage for nearly that amount hanging over it.

I am not certain what the amount of the mortgage is, but I am certain there is a mortgage on it.

I did not buy any lands in '76. I don't know of any being sold on Bayou de Siard that year that I recollect of. I do not know that property was at a low ebb that year. Land was not for sale. There

was no buyers or sellers that I know of. I have been over
126 the wood land on the Warfield place very little, and not with the view of examining it. Most of the wood land is low and liable to overflow.

By the COURT:

Q. What would you estimate the Warfield part of the Bon-air place, 560 acres, to be worth—the whole tract—on the 16th Dec., 1876?

A. It is very hard to estimate cash values in this country. I thought it ought to have been worth between $8,000 and $10,000, strictly for cash; but there is very few sales made that way.

GEO. W. MILLER sworn for defendant & warrantors:

I live in Bayou de Siard. I am acquainted with that part of the Bon-air place that belonged to Mrs. Warfield in 1876. The cleared land then on that place, I think, was worth $25 or $30 per acre. The wood land was worth about ten to fifteen dollars.

Cross-examined:

I have not known of any lands selling on Bayou de Siard in '76 for that price. I knew of none selling except at sh'ff's sale—none but the Strother part of the Bon-air place to Parker. I think that was sold in December, '77, or Jan'y, '78.

The Warfield land was good land & had been considered
127 one of the best places on Bayou de Siard. It is all good land. I have always thought that land on both sides of the road was good.

Redirect:

I do not recollect of any sales on Bayou de Siard in 1876; I mean that there was no sales at all that I recollect of.

There is a pecan grove & some walnut trees on the Warfield tract north of the road. I think there is about 20 or 25 acres of those trees. That grove is principally of pecan trees. They were planted there. I don't know how old they are.

I think they were four or five years old in '76. They were two or three years old when put there, & had been there four or five years.

I don't know whether they had commenced bearing in '76 or not. Some of them are bearing now.

I should think they added to the value of the land. Not knowing what the yield of a pecan tree is, I cannot say how much they added to the value.

Recross-examined:

I think those trees were about two years old when they were set out, & think they had been there three or four years in '76. I never knew a pecan tree to bear in 5 or 6 years. There were some on the

Filhiol place that bore before they were fourteen or 15
128 years old. It is generally said that they bear in ten years. I don't know.

A. J. McQUILLER sworn for defendant & warrantor:

I am acquainted with that part of the Bon-air place that belonged to Mrs. Warfield. I am deputy sheriff now. I live in Monroe. I lived on the Bon-air place one year. I am well acquainted with the lands in the Bon-air place. I cultivated part of the place there in '78. In '76 the cleared land on Mrs. Warfield's part of Bon-air was worth, I suppose, about 25 or 30 dollars per acre, taking the whole of the open land.

The wood land, I should think, was worth about ten or twelve dollars, probably fifteen dollars, per acre.

A portion of the wood land was well timbered. The wood land lay right along the railroad. The place is six miles from Monroe, I believe.

Cross-examined:

I lived on the Bon-air place in '78. I lived in the residence on Mrs. Strother's part of it. There were two houses at that time, '78, on Mrs. Warfield's part of it. Ben. Woodward occupied one building. There was one of the buildings at the back of the field in '78, just outside of the fence. I rented part of the Warfield land
in '78. I rented the middle cuts in the field. I rented from
129 Millard Parker. My estimate of that property was made with reference to 1876.

I do not know of any land at all that sold on Bayou de Siard in '76 nor in '77, nor any in '75.

It is my opinion that it ought to have been worth 25 or 30 dollars. My opinion is not predicated upon actual sales, for there were none.

Redirect:

A fair average yield of that land would be ½ or ¾ of a bale of cotton to the acre. I paid $4.50 per acre for it rent. Lands on Bayou de Siard usually rent from four to five dollars per acre.

There is a pecan grove on the Warfield part of the tract. I think there is about ten or twelve acres in pecans & walnut trees together.

That is situated on the north of the Monroe & Bastrop road. There is more than that much land there, but it is not all planted with pecans and walnuts.

I was not in the grove in '76 and do not know whether or not the trees were bearing then. Some few of the trees had fruit on them in '78. I should think they added something to the value of the land. I can form no estimate of the value they add. Since arriving at the age of manhood I have been a farmer until this year.

130 Defendant and warrantor offer in evidence—
8th. The petition, confession of judgment, and judgment in

the case of Oliver & Byrne *vs.* R. C. Strother *et al.*, No. 995, filed March 19th, '72.

9th. Offers execution issued in the case 27th day of Dec., 1873, & sheriff's return thereon.

10th. Execution issued on 17th February, '75, in the same case & sheriff's return thereon.

11th. Execution in the same case issued 30th June, 1873, & sh'ff's return thereon.

12th. Petition, confession of judgment, & the judgment thereon in the case No. 994, Miltenberger & Co. & Merrell *vs.* E. W. Warfield.

13th. Execution issued in that case on the 30th June, 1873, & sh'ff's return thereon.

14th. Execution issued in same case 27th Dec., '73, & the sh'ff's return thereon.

15th. Notice of seizure in the same case & the sh'ff's return thereon.

16th. Execution issued in the same case 17th February, '75, & the sh'ff's return thereon.

17th. Notice of seizure of the judgment served on the clerk of the court, Julius Ennemoser, dated 28th May, 1875, with petition & garnishment in the same case, filed 12th April, '75.

18th. Notice of seizure addressed to E. L. Strother and R. C. Strother, dated 13th April, 1875, signed by I. S. Ray, deputy sh'ff, with the sh'ff's return thereon.

131 19th. Copy of original lease to E. W. Warfield & Mrs. Strother, dated Jan'y 18th, '70, from Miltenberger & Co. & Merrell.

20th. Petition, confession, & judgment thereon in the case of L. D. McLain, ex'r, *et al. vs.* E. W. Warfield.

21st. Execution issued 17th February, '75, & sh'ff's return thereon, dated 8th April, '75, the first return, & the return showing that a copy was left dated 16th Aug'st, 1876.

22. Execution in the same case issued 17th Febr'y, '75, & sheriff's return thereon, dated 8th April, '75, & the return of the sh'ff showing he returned the original, dated 16th Aug'st, 1876.

23. Copy of deed from E. L. Strother & R. C. Strother to J. P. Parker, sale of right of redemption, dated 29th Dec., '77. (Copy to be furnished.)

Objected to by plaintiff on the ground that it is irrelevant; which objection was overruled, and to which ruling pl'ff excepts & retains this bill of exceptions.

24. Copy of act of sale of land with right of redemption by Mrs. E. L. Strother & husband to John P. Parker, dated 23 Dec., '76. (Copy to be supplied.)

25th. Letter of John Chaffe & brother, addressed to Judge Richardson, dated Feb'y 1st, 1878.

132 26th. Copy of note of E. W. Warfield to W. J. Q. Baker, dated 3rd May, '67, for $5,000, with 8% per annum int. from date, payable annually.

A. GREEN recalled for d'f't & warrantors:

There are no writs or copies of writs with sheriff's return in the cases of Miltenberger & Co. & Merrell, L. D. McLain, ex'r, *et al.* & Oliver & Byrne *vs.* E. W. Warfield, except those offered in evidence in this case, that I know of. There are none that I know of or that I can find.

They should be among the papers.

Defendant & warrantors offer in evidence—

27. The petition, note, and judgment in the case of H. Gerson, Jr., *vs.* E. W. Warfield, No. 1001, the note dated Jan. 1st, '72, and & for $806.57.

Offered—

28th. Petition, note, and judgment in the case of E. L. Strother & husband *vs.* E. W. Warfield, No. 1247.

Objected to by p'tiff on the ground that it is *res inter alios acta* & not covered by the pleadings & irrelevant to the issues in the case, and that the defendant & warrantor Dinkgrave, adm'r, are estopped from setting up such defense; that the confession of judgment
133 complained of was prior to his purchase. Objection sustained and the evidence excluded, to which ruling def't & warrantor excepts & retain this bill of exceptions, with leave to make the excluded documents part of the bill.

Defendants & warrantors propose to prove that Mrs. E. L. Strother held a note for the same amount as the note given by Mrs. Warfield to W. J. Q. Baker for $5,000, which note is the basis of Chaffe's judgment, bearing same date & same interest from date.

Which is objected to on the same ground as stated in the last objection; which objection is sustained & to which ruling def't & warrantor- excepts and retains this bill of exceptions.

29th. Offers judgment homologating the succession sale of the succession of B. H. Dinkgrave to J. T. Ludeling on the monition dated 7th June, 1878.

30th. Copy of deed of donation from Mrs. Warfield to Mrs. Strother of town lot.

J. T. LUDELING, duly sworn in behalf of defendant and warrantors:

(Read his testimony written by himself.)

Fifth District Court, Parish of Ouachita, La.

J. & C. CHAFFE
vs.
J. T. LUDELING.

134 I am the defendant in this suit. Dr. B. H. Dinkgrave lived with me in 1874 and up to his death.

Before he purchased the Oak Grove place from Mrs. Warfield he consulted me to know how it could be arranged for him to buy the place, which was said to be under seizure under executions controlled by Judge Richardson as attorney. I told him to get the seizing

creditors or their attorney to release the seizure by agreeing to pay the back taxes due by Mrs. Warfield to the State & the parish and thus extinguish the privilege in favor of the State and parish for said taxes on the rest of Mrs. Warfield's property.

I know that he bought the place shortly afterwards. Dr. Strother had previously offered to sell me the place for the taxes due by Mrs. Warfield & I had refused to buy. He was acting for Mrs. Warfield. I know the Bon-air plantation. I think the cleared lands on that place were worth in Sept., '75, from twenty-five to thirty dollars per acre, and the wood land about ten dollars per acre. There was then and there is now on the place a pecan and walnut grove or orchard, principally pecans, of about twelve or fourteen acres. The trees were just commencing to bear nuts.

135 The place is about five & half miles from Monroe. It fronts on Bayou de Siard and runs back to the railroad.

It is well timbered. [Mrs. Warfield was in embarrassed circumstances in 1875 & for some time before that.

When she died she was upwards of eighty years—eighty-two or three, I think—and she had been in feeble health some years before her death. He- business was transacted during many years before her death by her grandson-in-law, Dr. R. C. Strother, who is dead. She was in embarrassed circumstances several years before she went in bankruptcy.] There are about five hundred & sixty acres in the part of Bon-air which belonged to Mrs. Warfield, whereof about two hundred & fifteen or twenty acres were cleared & cultivated.

Bon-air was divided or partitioned between Mrs. Warfield & Mrs. Strother. The quantity above State — was Mrs. Warfield's part of the place.

[Since the purchase of Oak Grove by Dr. Dinkgrave there have been seven cabins built on the place. I think eight, but am not certain about that. The cotton-house and other outhouses have been built since the purchase of Dr. Dinkgrave. About fifty or sixty acres of land have — cleared, ditched, and fenced & put in

136 cultivation. There have been about two miles of ditching done on Oak Grove since the purchase of Dr. Dinkgrave—all the ditching on the place—and there have been about one hundred acres of land deadened on it.

There are about one hundred acres of land in the Oak Grove place less than is mentioned in the deed from Mrs. Warfield to Dr. Dinkgrave. There are only about three hundred & twenty acres in the place bought by Dr. Dinkgrave.]

At his succession sale I bought it & gave about twenty-five hundred for it.

Defendant & warrantors propose to prove by the witness, J. T. Ludeling, that Dr. Dinkgrave consulted him to know how it could be arranged for him to buy the place, which was said to be under seizure & execution, controlled by Judge Richardson as attorney, and what Judge Ludeling advised him to do in the matter.

Which was objected to by pl'ff on the ground that it is irrelevant,

res inter alios; that it is an attempt to contradict the terms of the within act of sale of Mrs. Warfield to Dinkgrave by parol testimony, & as such in violation of Art. 2276 of C. C., & that it is *here-*
say evidence, the conversation between defendant and other
137 parties, & not in the presence of pl'ffs.

Which objection being overruled, pl'tiff- excepts & reserve their bill of exceptions in this form.

Defendant and warrantors propose to prove by the witness, J. T. Ludeling, that Mrs. Warfield was in embarrassed circumstances in '75, & for some time before that, & that she was very old & infirm, and had been for some time before her death; which was objected to on the ground that it is not covered by the pleadings, no allegations to that effect in def't's answer, & that the validity of the sh'ff's sale cannot be attacked collaterally; & defendant and warrantors are estopped from denying the validity of those judgments & the sale thereunder for the reason that they existed as judicial mortgages on the property at the time it was sold by Mrs. Warfield to Dr. Dinkgrave; which objections were sustained and the testimony excluded; to which ruling defendant & warrantors except & retain this bill of exceptions and make the testimony excluded a part of this bill.

Defend'ts & warrantors propose to prove by the witness the improvements that have been put upon the Oak Grove plantation since
the purchase thereof by Dr. Dinkgrave; which is objected to
138 by pl'tiffs on the ground that the allegations in the answer of the defendant are too vague & general to admit the proof or to put the pl'tiff- on *his* guard, and that this is an hypothecary action against the third possessor and he is not entitled to compensation for improvements.

Which objections were sustained and the testimony excluded; to which ruling defend't and warrantors except, with permission to make the excluded testimony part of the bill of exceptions.

Defendant and warrantor propose to prove by the witness that there were about one hundred acres of land in the Oak Grove place less than is mentioned in the deed of Mrs. Warfield to Dr. Dinkgrave, and there are only about 300 acres in the place belonging to Dr. Dinkgrave.

Which was objected to by pl'tiffs on the ground that there was no allegation in the petition to justify the introduction of such evidence; which objections were sustained and to which ruling pl'tiff & warrantor except & make the excluded testimony part of this bill of exceptions. (The excluded portions of the witness'*es* testimony is marked in brackets.)

J. T. LUDELING cross-examined by p'ffs:

139 Q. Are you in possession of that part of the S. ½ of S. E. ¼ sec. 35, T. 18, R. 4 east, south of the V., S. & P. railroad?

Objected to by defendant & warrantors on the ground that the evidence is inadmissible under the allegations of the petition and the notice served upon defendant.

Which objections were sustained and the testimony excluded; to which ruling pl'ff- excepts & retain this bill of exceptions.

Defendant & warrantors offer in evidence—

31st. Copy of donation of F. P. Stubbs to E. L. Strother, recorded in Notarial Book S, page 189, dated 17th May, 1869.

Objected to by pl'tiffs for the reason that in so far as it is sought to sustain the plea of discussion the plea is a dilatory exception & should have been pleaded *in limine litis;* not having been filed until two days after judgment by default, & then in the answer, it is too late, & no evidence is admissible to sustain it, & that it is not a dilatory exception; it was waived by defendant going to trial without having disposed of it, & therefore no evidence is admissible to sustain it, & for the further reason that it is an attempt to point out property not in the possession of the judgment debtor, and
140 for the further reason that it is *res inter alios acta,* & that property pointed out has been out of the possession of the judgment debtor for more than twelve years, & for the further reason that it is inadmissible under the answer.

Objection sustained & the evidence excluded; to which ruling defend't & warrantors except and attach a copy of the deed as part of the bill of exceptions.

32. Plaintiff & warrantor propose to offer—

The execution in the case of Miltenberger & Co. & Merrell *vs.* E. W. Warfield, No. 43[illegible], at which property and other property was acquired by F. P. Stubbs.

Which is objected to by pl'tiff on the same grounds as stated in the last objection; which objections were sustained, & to which ruling defendant and warrantor Dinkgrave except & attach the excluded evidence & make — a part of the bill of exceptions.

33. Defendant and warrantor offer in evidence—

Deed from M. E. Fitz to Mrs. E. W. Warfield, dated March 10th, '52, in Book "P," page 432; also copy of act of donation of lot, in Book "u," page 295, dated May 15th, '73, from Mrs. Warfield to Mrs. E. L. Strother.

Objected to by pl'tiff on the ground stated in the above objection, & for the further reason that there is no plea of
141 discussion or tender or offer of tender or fund to carry on the discussion in the warrantor's answer to justify the introduction of the evidence.

Which objections were sustained; to which ruling defendant and warrantor Dinkgrave except & retain this bill of exceptions and make the excluded evidence part of the bill.

34. Defendant & warrantor offer in evidence the inventory of the succession of B. H. Dinkgrave, filed 15th Febr'y, 1878.

Objected to by pl'i'ff on the ground that it is *res inter alios acta* & irrelevant, and for the further reason that it is inadmissible under the answer of d'f't & the warrantors. Objection overruled; to which ruling p'ffs excepts & retain a bill of exceptions in this form:

35. Offer the opposition in the succ'n of B. H. Dinkgrave of S. Meyer, Jno. G. Sanders, D. A. Breard, Sr., G. W. McFee, Frank Terrell, and Isdore Newman.

Objected to by pl'ff on the ground that it is irrelevant, inadmissible under the pleadings, and is *res inter alios acta*.

Objection sustained & the evidence excluded; to which ruling def't and warrantor except & make the excluded documents part of this bill of exceptions.

Offers—

142 36. Petition and order of sale in the same succ'n. Final account and judgment of homologation.

Objected to by pl'ffs on the ground that it is in *res inter alios acta* & irrelevant to the issues involved in this case.

Objection overruled so far as the order of sale is concerned & sustained as to the other documents offered; to which ruling def't and warrantor except and attach the excluded evidence & make it part of the bill of exceptions.

37. Offers proces verbal of the sale of the succession of B. H Dinkgrave.

Defendant & warrantor offer to prove that there was no citation of appeal in the case of Mrs. E. W. Warfield *vs.* G. B. Hamlet, sh'ff, *et al.*, No. 1231.

A. GREEN recalled for def't & warrantor:

There was no citation of appeal issued in the case No. 1231, E. W. Warfield *vs.* G. B. Hamlet, sh'ff, *et al.*

I see from examination of the transcript in that case the following words, which follow the order of appeal in that case:

Service of the within petition of appeal and service acknowledged this 25th October, 1875.

(Signed) G. B. HAMLET, *Sh'ff.*
R. W. RICHARDSON,
Attorney for Murrell, Oliver & Byrne & McLain, Ex'r.
MORRISON & FARMER,
Att'ys for Boisbanc.

38. Defendant and warrantor offer copy of appeal bond in
143 the case No. 1231, E. W. Warfield *vs.* G. B. Hamlet *et al.*

A. GREEN recalled for def't & warrantor:

The October term, 1875, of the district court adjourned the 15th day of October, '75, as appears by the minutes.

39. Def't and warrantor offer commission to take the testimony of Mrs. E. L. Strother, addressed to J. G. Garland, special commissioner, in Mo., dated 23 Dec., '81, with the interrogatories and the commissioner's return thereon.

Warrantor Dinkgrave again offers all the testimony already offered by the defendant & warrantor, subject to the objections made and the rulings of the court thereon.

Pl'ffs now offer the further objection that there is no plea of discussion in the answer of the warrantor Dinkgrave setting up the

plea of discussion, and no tender or offer to tender any funds to carry on the discussion.

By the COURT: This evidence has all been offered by the warrantor and ruled on by the court. I see no necessity for reopening it; but, as it is all in writing & will not have to be repeated
144 in the transcript, the request of the warrantor to offer it is granted, subject, as he states, to the same objections and rulings.

(Def'd't and warrantor Dinkgrave close.)

Warrantor Strother offers the same evidence already offered by defend't and warrantor Dinkgrave, except that portion offered by defendant and warrantor against her.

To the admissibility of which evidence pl'ffs object that Mrs. Strother being one of the parties to the act of sale from Mrs. Warfield to Dinkgrave in June, 1876, she is estopped from denying the consideration & validity of that sale, and for the further reason that it is inadmissible under the allegations in her answer to the call in warranty, and for the further reason that parol evidence cannot be admitted to contradict or vary the terms of the act of sale from Mrs. Warfield to Dinkgrave.

By the COURT: The court does not consider the objection, because the introduction of the evidence has already been ruled upon and distinctly reoffered, subject to the original objections & ruling by the court.

W. W. FARMER, Esq., sworn for warrantor Strother:

145 I am somewhat acquainted with the nature of this case and the amount involved—not accurately acquainted with the amount involved. I have looked into the pleadings. I see it is a litigated matter. I think one hundred dollars would be a light fee for the services of the att'y defending Mrs. E. L. Strother, warrantor in the case, whether there is an appeal or not.

(Warrantor Strother closes.)

Plaintiff reoffers in rebuttal—

1. The record in the case of E. W. Warfield *vs.* G. B. Hamlet, sh'ff, *et al.*, consisting of the petition & affidavit, dated 13th M'ch, order of injunction of same date, writ and sheriff's return answer, verdict & judgment, petition and order of appeal, and certificate of non-appeal by clerk of the supreme court & its filing in the clerk's office 8th August, 1876.

Objected to by defendant & warrantor on the ground that it is *res inter alios acta*, and it is inadmissible under the allegations of the pleadings.

Objections overruled; to which ruling defend'ts and warrantors except and reserve this bill of exceptions.

2nd. Pl'tiffs offer copy of the judgment in the case No. 994, Miltenberger & Merrell *vs.* E. W. Warfield.

3rd. Original execution issued in that case, dated 17th February, '75, & return.

146 4. Copy of the original execution last offered in same case & sh'ff's return thereon, dated 16th August, '75.

Objected to by defendant & warrantor on the ground that there is no filing on it in the clerk's office.

Objection overruled. Def'ts and warrantors except.

5th. Certified copy of judgment in the case of Oliver A. Byrne *vs.* R. C. Strother *et al.*, dated 15th April, '72.

6th. Original execution issued in that case on 17th Feb'y, '75, with endorsements thereon & return of the sh'ff.

7th. Certified copy of said writ, with sh'ff's return & certificate thereon.

Objected to by defend't & warrantor on the ground stated in last objection.

Objection overruled. Defend't & warrantor except & retain this bill of exceptions.

8th. Certified copy of judgment in the case of L. D. McLain, ex'r, *vs.* E. W. Warfield.

9th. Original execution issued 17th Febr'y, '75, in same case, with the endorsements thereon and return of the sh'ff & certificate.

10th. Copy of the execution last offered, with the endorsements & return of the sh'ff and certificate.

Objected to by def't and warrantors on the ground that there is no filing on it by the clerk.

147 Objection overruled, to which defendant and warrantor except & reserve this bill of exceptions.

11th. Certified copy of judgment in the case of H. Gerson, Jr., *vs.* Mrs. E. W. Warfield, dated 8th April, 1872.

12. Deed from sheriff to Jno. & Chas. Chaffe on page 84 of notarial record "W" to page 91, inclusive, together with the papers attached thereto, containing plat, sheriff's deed, advertisement, & certificate of mortgages.

To which defendant & warrantors object on the ground that it is not the best evidence of what is attempted to be proved, the original advertisement in the paper in which it was made and the sheriff's return on the writs being the best evidence.

Objections overruled and the evidence admitted; to which ruling def'ts and warrantors except, & retain a bill of exceptions in this form.

TALBOT STILLMAN, called for pl'tiffs, duly sworn:

In 1876 I resided in Monroe. I was not present at the sheriff's sale under the execution in the case of Miltenberger and others *vs.* Mrs. E. W. Warfield.

I was in town, in the office of Morrison & Farmer, att'ys.

148 I knew all the officers of the sheriff's office at that time. There were two deputies I know of at that time—S. W. Wood and S. Whited. Mr. Whited was office deputy. Hamlet was sheriff. I don't think Hamlet was then present in the parish.

I was at the time clerking for Morrison & Farmer, attorneys-at-law, and on the day on which the deed was signed was directed by Col. Morrison to take the deed to Mr. Wood, deputy sheriff, for the purpose of having him sign it. He directed that I take along a witness, & Mr. Moise was about the first person I met after secur-

ing my buggy & horse, & I asked him to accompany me for the purpose of witnessing the signing of the deed by the deputy sheriff. The deed was signed, I think, about eight or nine o'clock on the night of the day of its date.

The deed was prepared by Col. Morrison in the effice after the sale, which, I think, occurred rather late in the evening, possibly near two or three o'clock, & was signed that day.

I know it was signed that day from the fact that Mr. Chaffe wanted to leave on the following morning on the train.

I don't remember which Chaffe it was.

I think it was Charles Chaffe. I don't remember how long Mr. Chaffe had been here before the sale. He was here the day of the sale. He left next morning. Mr. Moise was with me when
149 I went out to have the deed signed.

Mr. Wood signed the deed in my presence. No one else was present at the time of the signing of the deed except Mr. Wood, Mr. Moise, and myself.

Wood did not express unwillingness to sign the act. He did not try to put it off. I did not use any persuasion or act to induce him to sign the deed. I did not think it was necessary. There were no threats of violence or intimidation whatever used by Mr. Moise or myself or any one else while we were there.

There was nothing that transpired between us and Mr. Wood during the time that was unpleasant in any way. He made no objection to signing the deed. He did not state that the facts were not correctly stated in the deed, for he made no objection. I was with Mr. Wood but a very few moments.

We drove up and called, & he asked who was there. I answered, myself & Mr. Moise, & stated to Wood what we wanted. He asked us in, and I told him my business. He got his pen and ink from another room & signed the deed. I do not remember to have told him that it was necessary to sign it that night because Mr. Chaffe was going away. I know I told him it was the deed to
150 Chaffe of the Warfield property, and asked him to read it, and he signed it. I am not positive, but think it was read. I am almost sure it was read. It was handed to him, and he either read or I read it. I did not have any arms with me; none were displayed. I think Capt. Farmer was here at the time of that sale, but I do not remember positively whether he was or not. I know Col. Morrison attended the sale. There was no reference made at the time by myself or Mr. Moise or Wood to politics during the time we were there or to anything else except the business that carried me there.

That was the evening of the day on which the sale was had. When I left to secure a witness I had no idea of taking Mr. Moise more than anybody else.

That was eight or nine o'clock in the evening. I stated that Col. Morrison attended the sale. I do not know positively that he was present. I was not present myself.

Cross-examined:

I picked up Mr. Moise on De Siard St., I think, near Sam. Kuhn's. I got my buggy & horse at Endom's. When I started out to Wood's he was out at Hudson's, about three-quarters of a mile beyond
151 the corporate limits of the town. It is a little house isolated—off to itself.

I did not tell Wood I had picked up Mr. Moise accidentally to bring him along as a witness.

Wood did not ask me or Mr. Moise to act as witnesses and go out there to witness the deed. I was sent there by Col. Morrison for the purpose of having the deed signed & witnessed. It was between eight and nine o'clock when we went there.

It was night. I had never known of any other sheriff's deed signed at night that way in my experience.

I hardly know how long I was at Hudson's. As I said, I am satisfied the deed was read, and how long it took to read it I cannot say, but I know we left immediately after it was signed, and we did nothing in there except to attend to the matter.

I think we took seats; I can't state positively. There was either a candle or lamp light in the room. I can't state that positively. I cannot state positively that I read the deed, nor can I state positively that Wood read it.

Wood is a colored man; Hamlet is a colored man.

Was there not considerable political excitement at Monroe and in the neighborhood at that time?

Objected to by plaintiff on the ground that it is irrelevant
152 & inadmissible under the pleadings. Objection overruled; to which ruling pl'ff excepts, and reserved a bill of exception in this form.

A. Yes.

Mr. Chaffe had nothing to do with the signing of the deed on that particular day, except that he wished to leave next morning. That was the reason given me. Wood signed no other paper except the act or sh'ff's deed. I don't recollect that there was anything else attached to it than the deed itself.

There may have been an advertisement; there was only one act signed there that night. That was in Col. Morrison's handwriting.

Redirect:

Mr. Chaffe was a resident of New Orleans, and had nothing to do with the political excitement here that I know of. Col. Morrison died on the 18th October, 1876, at Delhi. I don't know how long he had been absent from home at the time of his death.

He had been down to Winnsboro'. He had a farming interest in Franklin, and there may have been court going on at the time.

H. Moise, sworn for pl'tiffs, says:

153 I was a resident of this parish in '75 & '76. I knew Steve Wood, deputy sh'ff, at that time. I was present at the

signing of the sheriff's deed by S. W. Wood, deputy sheriff, to Jno. & Chas. Chaffe, deed to the Bon-air plantation. I was on my way home from Meyers' store, where I was keeping books, and was at Sam. Kuhn's when Mr. Stillman called me out and asked me to go out with him. There was no previous understanding or agreement between me and Mr. Stillman about my going out with him. I suppose that was between eight and nine o'clock at night.

We went out there in a buggy. I went in company with Mr. Stillman out to the deputy sheriff's. The deputy sheriff was living at the house known as Susan Lawrence's. I don't know the distance; I suppose about ¾ of a mile out of the corporate limits of the town. Mr. Stillman called to Steve Wood when we got there. Steve replied and asked who was with him. He answered, Mr. Moise. He asked, "Mr. Moise, the book-keeper of Meyers?" Mr. Stillman told him yes. He then asked us in. I don't know of anybody else being there except Mr. Stillman, Wood, & myself. There was no violence or threats at all used; no angry discussion that I know of.

I never heard any. I did not have any weapon with me. I
154 don't know whether the deed was read to Wood or not. My impression is he looked over it himself; that is my recollection. He had plenty of opportunity to read the deed if he wanted to. There was not a particle of appearance on the part of Wood of his being frightened or intimidated. He did not appear that way to me. He made no complaint about our coming there at night. He did not express any astonishment at our coming there at night that I recollect of. I did not know anything about such a sale having been made when I went out there. I did not know what I was signing as a witness. I had no arms; did not have a pocket knife about me. I don't know anything about the intelligence of Mr. Wood. I never spoke to him half a dozen times in my life. Personally I know nothing about him.

Cross-examined:

When we rode up to Wood's house he came out and asked Mr. Stillman who was with him. He opened the door and came on the gallery & called to know who was there. I didn't read that deed to Wood that I recollect. I don't think I did. I don't recollect whether Mr. Stillman read it to him or not. I think Wood looked over it; whether through and through I do not know. I
155 do not recollect whether I was sitting down or standing up. I do not recollect whether Wood was sitting down or standing up. There was plenty of light to read and write by. There was a good light in the room. I do not recollect whether it was a candle or a lamp. If it had been a candle I think I would have noticed the fact, as it would have been very dim in the room.

I can't say how long we were there; fifteen or twenty minutes, perhaps; possibly more. Until I was called up before in the same matter I didn't know what Wood signed. I may have read the deed & forgotten it. It has been six years ago. I recollect only one act, that Wood signed that night. I don't think I signed as a witness but once that night.

TALBOT STILLMAN reappears to correct his testimony:

Since hearing the testimony of Mr. Moise I am satisfied that I did not myself read the deed to Wood.

Examined by pl'tiff:

I think Wood read the deed. He had plenty of time to read it. It was offered to him for the purpose. He took it and had it in his hand.

Examined by def't & warrantor:

156 It is a fact that Col. Morrison wrote a very bad hand, which was very hard to read. Mr. Wood did not take that deed out of my presence. Wood was in his night clothes when we got there.

R. W. RICHARDSON recalled for pl'tiff:

I was the attorney that managed the business of Miltenberger & Co. & I. W. Murrell against E. W. Warfield, McLain, ex'r, ag'st Mrs. Warfield, & Oliver & Byrne against R. C. Strother & E. W. Warfield. Neither Jno. nor Charles Chaffe had any control over the execution of these judgments. They had no interest in procuring the judgments. I ordered the execution and ordered the sheriff or deputy sheriff to execute them. There was no effort to collect the execution in the case of Miltenberger & Merrell previous to 17th Febr'y, 1875; perhaps in the others.

Q. As attorney for plaintiff, will you state, if any, what instructions you gave to the sheriff, if any you gave, with reference to the seizure under those writs of his subsequent action?

Objected to by def't & warrantor on the grounds that it is inadmissible under the allegations of the pleadings, irrelevant, and as the sheriff's returns are the best evidence regarding the seizure; which objections were overruled by the court, and the testi-
157 mony admitted; to which ruling the def't & warrantor excepted & retained a bill.

A. From my experience of the obstacles thrown in the way of the collection of these debts I was unusually particular in endeavouring to avoid further litigation, and I gave the deputy sheriff specific instructions as to what to do; among others, not to seize the graveyard. After he had mounted his horse to make the seizure I gave him instructions as to how to make the seizure. He must go upon the land seized, which was the western portion of what had been called the Bon-air plantation, and to appoint a keeper. I suppose the date was shown by the sheriff's return.

Q. Was or was it not in the spring of 1875 the Bon-air p-antation — advertised for sale by Sheriff Hamlet under those writs?

Which is objected to on the ground that the best evidence of the facts is the advertisement; which objection is overruled by the court and the testimony admitted.

To which ruling of the court the defend't and warrantor excepted.

A. The property was advertised for sale at a time previous to that on which it was sold.

From the advertisement shown me as annexed to the certf. of mortgage I am satisfied that it is the printed advertisement of the advertisement of sale.

158 It was taken from the papers; I don't know which; I presume from the Intelligencer, the official paper.

The date of the certificate presented with advertisement annexed is dated the 3rd April, 1875.

There was no sale under the advertisement, for the reason that it was either because there was an injunction or release of the seizure, or, possibly, both.

Q. What injunction stopped this sale?

A. Mrs. Strothers got out an injunction to one of the suits. An injunction gotten out by Mrs. Warfield arrested the sale 3rd April, 1875.

Objected to on the ground that the injunction itself is the best evidence as to who got it out and what it prevented; and, further, that witness cannot be given records to examine with a view to refresh his memory in answering questions.

Which objections were overruled & testimony received. Bill of exceptions reserved.

A. Sale was arrested by an injunction gotten out by Mrs. Warfield in suit # 1231.

Q. Examine that record and you will observe an order & petition of appeal upon which there is an acknowledgment of service purporting to be signed by yourself and others, and state whether they were signed by yourself & others.

159 Objected to on the ground above stated & on the further ground that it is irrelevant, *res inter alios acta*, inadmissible under the pleadings, the document being the best evidence; which objection was overruled by the court & bill retained.

A. The signature of acknowledgment of service by R. W. Richardson was made by me. I do not know the signature of Hamlet. Pending the litigation the interest of Miltenberger was sold and purchased by Boisblanc, who were represented by Morrison and Farmer, but it was understood between Mr. Morrison and myself that I would continue to control the collection of the debt; after the injunction was disposed of I continued to prosecute the collection of the debt.

I directed the proceedings under which the property was sold.

There was something said about an order of protection to be obtained from the bankrupt court.

The only effort made, that I can remember, to prevent the sale on the 16th Sept., 1876, was some conversation relative to certificate

of protection to the sheriff or his deputy Mr. Baker, the att'y for Mrs. Warfield, claimed to have.

The sheriff showed no evidence to avoid making the sale except as regards the certificate of protection.

160 I saw no necessity of threats or any acts of violence or coercion to induce the sheriff to make the sale, and none were made, except, perhaps, that if it was not made I would make him responsible for damages. I may have stated the above, but am not certain.

I was present at the sale; went there to see that the requirements of the law were complied with. I observed all that was done by the officers making the sale. The sale was made between 11 and 2 o'clock, about the usual time sheriff sales are made; the advertisement was read, the certificate of mortgages was read, and the 2 article- of the code of practice usually read at sheriff's sales, and the usual announcement was made of the sale of the property, usual announcement of the title of the suits, title of the writs, and terms of sale.

The sale was made; the property was offered; the sale was made at the court-house. There were not many persons present. It was adjudicated to the Chaffes; Chas. Chaffe was present.

It was bid in by Chaffe, or Morrison for Chaffe.

The bidder before the sale had no control over the execution. Neither Chas. nor John Chaffe had any control over the execution.

—. To whom was the property adjudicated, if adjudicated at all, at that sale?

161 Objected to, as the best evidence is the return of the sheriff; which objection was overruled by the court, as it has been shown that there was no sheriff's return, and the court consedes this testimony in rebuttal of that offered by defend'ts in regard to sh'ff; to which ruling defendant excepted and retained a bill.

A. The property was cried and knocked off in the usual manner to Jno. and Charles Chaffe—to one or both of them.

I do not recollect, independent of the papers, whether it was to one or both of the Chaffes.

Mr. Chaffe paid to me the amount of the execution by draft that evening, except the amount going to Boisblanc, for which he executed a draft in favor of Morrison or Morrison & Farmer; I think C. H. Morrison. It was done that evening about dusk.

I don't remember whether the deputy sheriff was present when the settlement was made. The settlement occupied some little time, as drafts were taken in favor of each of the parties interested in those executions. The act of sale and sh'ff's deed was prepared by C. H. Morrison.

I was engaged all the evening in making the calculation of the amount going to each of the parties interested in the execu-

162 tions—*pro rata* am't going to Boisblanc, the purchaser of Miltenberger's interest, as well as calculation of *pro rata* of numerous bills of costs in various matters of litigation previously

had in the Miltenberger and Merrell claim. It took some time to complete them.

There was a survey dividing the property into lots, made under the direction of the sheriff, by the parish surveyor.

I knew the property was in the possession of lessees.

I don't remember giving any specific directions in regard to the seizure of the rent. I did not propose to interfere with the lessees. I did nothing in relation to the rent. They went into possession by my leasing the property for them in 1877. I may be mistaken as to the year; it may have been 1878.

The sheriff, Hamlet, was, I think, absent at the time of the sale. I do not recollect distinctly whether he returned or not.

I think he came back. I don't remember whether his term of office had expired when he returned. I don't think that Mr. Wood was well qualified to discharge the duties of deputy sheriff. The active duties of the sheriff's office were not generally well performed.

I felt it my duty in important matter to watch its prog-
163 ress. I found it generally necessary for a lawyer to watch his business in the hands of the sheriff in important matter, and more so during Hamlet's incumbency than any other officer's.

In important cases the attorney for the plaintiff frequently writes up the deeds of property sold under execution. Mr. Morrison wrote up the deed at my instance. Chaffe was anxious to get off on the following morning on the train. I had not time to make the calculation necessary to be made that evening. I do not remember having read the deed written by Morrison. I have read the deed made by Wood to Jno. & C. Chaffe.

Q. Did you read the deed prepared by Morrison?

A. I have no recollection of so doing.

Q. Did you ever read the deed prepared by Morrison?

A. At the time I answered the previous question I inferred that the counsel inquired whether I read the deed that evening, and answered under that impression. To the second question I answer I have read the deed.

Q. State whether or not is the statement of facts as recited in the deed with reference as to what occurred at the sale of the 16th September, 1876, is correct.

164 Objected to on the ground that it calls for the opinion and judgment of the witness as to the recitals in an act, which is not evidence.

Overruled by the court and testimony admitted; to which ruling the defend't and warrantor excepted and reserve a bill.

A. I have not a copy of the deed before me, and, it being two or three years since I read it, my impression is now that it contains a correct recital of facts.

Cross-examined by defend't & warrantor:

The amount of the execution under which the sale was made—I cannot tell you now from recollection the aggregate amount of the

execution. If desired, I will furnish the amount. I think it was in 1878 that I rented the property for Chaffe. That was the first act of possession that I recollect.

I know of no distinct act of the sheriff putting Chaffe into actual possession.

In the end of the year 1876 my recollection is that Calhoun, Parker, and a negro named Woodard were in possession as lessees on 16th Sept., 1876.

I had no other interest in the sale of Bon-air except to collect the money on the execution.

165 The only other interest was that the graveyard was reserved in the sale of Mrs. Warfield as a family graveyard, and my father & mother and other members of my family were buried there.

The only obstacle I saw in making the sale was a certificate of protection the sheriff claimed to have received from the U. S. D. court N. Orleans. I have no recollection what deputy it was, whether Whited or Wood, spoke to me in reference to the certificate of protection.

I don't remember whether Mr. Garrett was present.

Their object in suing me I cannot state, but suppose it was to induce me to postpone the sale. I do not recollect that anything was said about an indemnity bond, if anything was said.

I do not of my own knowledge know whether Mr. Whited consulted Mr. Garrett. He may have told me so, but I do not remember. I do not recollect anything Mr. Whited told me.

All I recollect is that one of the deputies told me he had a certificate of protection, and expressed doubts as to the propriety of making a sale.

I think that the certificate of protection was issued in the Warfield bankrupt case. I do not know where Sheriff Hamlet was; think he was out of the State; so understood. I understood

166 he went away, fearing trouble on account of political excitement.

MILLARD F. PARKER, sworn for pl'ff, says: In 1875 I was living on the Bon-air plantation; I was a renter. Shelby, Green, Calhoun, and myself were living there. I rented in 1875 from Dr. Strother's; I continued to rent 1876. I don't remember positively if there was any change in my contract in 1876. There may have been a change in the price. 1875 was the first year I lived there; 1876 I remained there and leased from Mrs. Warfield; I mean Dr. Strother. The money went to Mrs. Warfield; the land was Mrs. Warfield's. In the latter part of 1876 rented for the year 1877 from Capt. Farmer, agent for Chaffe. I cultivated, myself & Calhoun, what was Mrs. Warfield's part of Bon-air plantation in 1877. I paid the rent of that year to Capt. Farmer; Capt. Farmer represented Chaffe. I have known the Bon-air place intimately since 1875. On Mrs. Strother's part of the Bon-air place there is 400 acres of open land. Some new opened in the last two years. In 1876 there was 330 acres open land; there was 340 acres of wood land.

The Bon-air plantation was cultivated as a whole up to 1879. The buildings were all on the part belonging to Mrs. Strother. Two were on the Warfield portion; one in the pecan grove, & one back
167 of the field, both common cabins. On Mrs. Strother's part were the balance of the cabins—fully 25—the dwelling-house and stables, & also an old gin-house not worth much. All the cabins were of hewn logs, except, I think, six we built—box cabins.

There was no division fence between the part belonging to Mrs. Warfield & of Mrs. Strother until 1879.

On Mrs. Warfield's property in 1876 there was 200 acres of cleared land. That is what we rented it for. I think there is a good deal of difference between the Warfield & Strother lands.

I think that the Strother portion is considered the best land, being newer & had all the benefit of fertilizing. I have cultivated both places. I don't remember exactly the difference in the crops. There is some good land on the Warfield place—two or three cuts in the back, say 40 or 50 acres.

I do not know the cash value of Mrs. Warfield's portion in 1876. There was not much land selling at that time.

In 1876 I would have thought $5,000 a good price for the Warfield portion. I did not think it was worth over half as much as Mrs. Strother's portion in 1876, taking in the improvements.

Jno. Parker was talking about buying it in 1877 or 1878.
168 He spoke to me about it & asked me what I thought it was worth. I told him I did not think it worth over $4,000. It was in better condition in 1877 than in 1876.

Cross-examined:

It was in better condition in 1877 than in 1876, as the fences were repaired & ditches cleaned out. In the Warfield part I think there is 1,200 acres; have always so heard; don't know myself. I know the cleared land on the Warfield & Strother portions, about as well one as the other, but am better acquainted with the land on the Strother part than that on the Warfield. My knowledge of the quantity of land on Strother part is 673 acres.

The pecan grove, 15 or 16 acres, is on the Warfield part. I do not know how old the pecan trees are. They may have borne in 1877. They may add to the value of the land now. They did not benefit us any.

The cabins on the Strother place were old when we went there. We built 5 or 6 double box cabins, good cabins. The dwelling was old, but a very good house. The gin-house was very old. Calhoun ginned on it one or two years; was removed in 1878. We built a new one. Dr. Strother was Mrs. Warfield's agent, so I understood.

Did not rent per acre. I think I paid $350.00 the first year
169 and $450 the second year; am not certain.

Redirect:

The whole place was known as the Warfield place or Bon-air plantation.

Dr. Strother was Mrs. Warfield's agent. Dr. Strother's wife owned an interest in Bon-air.

The balance was owned by Mrs. Warfield until Chaffe bought it.

In speaking of the whole place I meant the 1,200 acres alluded to previously; perhaps more.

I have always understood that the Bon-air place contained 1,200 acres. It takes in both places.

I don't know how much wood land there is in the Warfield part.

Plaintiffs offer in evidence—

13. Certificate of mortgages made 3rd April, 1875, by F. A. Hall, d'y recorder, in the matter of Miltenberger & Co. & Merrell, Oliver & Byrne & L. D. McLain *vs.* E. W. Warfield.

14. Copy of contract of lease between John Chaffe & Bro. and C. H. Calhoun & M. F. Parker, dated 16th Jan'y, '77.

W. W. FARMER, Esq., recalled for pl'tiff:

I was practicing law here in '75 & '76, in copartnership
170 with C. H. Morrison. I was not at home about the middle
of Sept., '76. I was not present at the sale in controversy in this case.

Our firm had only this to do with the sale: We were att'ys for E. Boisblanc, who had a judgment against Miltenberger, one of the seizing creditors, and Boisblanc had become the owner of Miltenberger's interest. Messrs. R. W. and R. Richardson, att'ys for Miltenberger, had obtained this judgment, & the control of the business was left entirely in their hands, and they received the fee for obtaining the judgment & collecting the money.

Our firm did not have anything to do with the control of the execution & sale. That was done entirely by Judge Richardson. Col. Morrison died 18th Oct., 1876, at Delhi, La., Richland parish.

At the time of his death he had been absent from his residence here several weeks. He left soon after the sale.

I am satisfied that G. B. Hamlet was not in Ouachita parish about the middle of Sept., 1876. He left Ouachita parish on 2nd Sept., 1876. It is true that he left with my advice & that I furnished him the money to go with. On that day there was a great gathering of people in town here to attend a barbecue. I heard of
some threats against Hamlet by some parties that if they
171 met him here his life would be in great danger. I hurried
him up and advised him to leave. He said he did not have the money, whereupon I furnished him the money & he left that night.

That had no connection whatever with that sale or with any other legal business.

It was simply an act of humanity on my part, which he very highly appreciated, and has so expressed himself many times since.

At that time his principal office deputy in charge was S. Whited. S. W. Woods was also his deputy.

Hamlet is colored by implication, I suppose. He passed for a

colored man, but he is so nearly white you would not know he was colored unless you were told. Wood is a mulat-o.

Hamlet was a man of fair education for a man of his kind—a political adventurer. Wood was a man of some education; knew how to read and write. They did the best they could, but the business of the office needed the supervision of an attorney in order to keep it correct and accurate.

It was the custom of att'ys to supervise and in many instances to write sh'ff's deeds & sheriff's returns, especially in important matters. It was universally the custom of our firm. I can't say
172 that it was any more necessary then than usual. My experience with sheriffs is that with the average you have to do that, white or colored. Morrison & Farmer had been Chaffe's attorneys in all his business in this parish up to the date of that sale, and continued to be until Morrison's death, in 1876. I was his attorney from that time until I retired from active practice on account of ill-health, which was in '77.

When I left the State for Texas, in the fall of 1876, after the sale, the Bon-air property was in the possession of Calhoun & Parker, lessees.

At the time of that sale, which was some time afterwards, I was absent from Monroe, & returned by the last of October, and immediately after my return I communicated with Calhoun & Parker, who stated that they had been present at the sale & acknowledged Chaffe's ownership, & proposed to lease the place for 1877, and we agreed upon the lease, which was executed, & they received the property from me as Chaffe's agent, as the lease of 1877, and occupied it as such.

At the end of '77, I being absent & sick, Judge Richardson was appointed agent to lease the property.

Cross-examined by def't & warrantor:

I learned subsequently that Woodward was there in '76,
173 claiming to be a lessee, but in a suit he was decreed not to be. I wrote up the lease to the lessees, & my recollection is it embraced the whole plantation. It may not have been. I wrote the lease of the Bon-air property to Calhoun & Parker & Green & Co. I did not — until after the lawsuits that Ben. Woodward was there. I did not know that Woodward was there leasing the pecan grove until I learned subsequently by lawsuits.

Plaintiffs offer in evidence:

15. The record in the case of E. W. Warfield *vs.* Calhoun & Parker, No. 1305.

Objected to by defendant & warrantor on the ground that it is *res inter alios acta*, inadmissible under the pleadings, & on the further ground that it is not in rebuttal of anything offered by def't & warrantor.

Objection sustained & evidence excluded; to which ruling pl'ffs except and make the excluded evidence a part of this bill of exceptions.

Offers record in the case C. H. Calhoun & M. T. Parker *vs.* Ben. Woodward, No. 1117.

Objected to by defend't & warrantor on the ground that it is *res inter alios acta*, inadmissible under the pleadings, and not in rebuttal.

Objection sustained & evidence excluded; to which ruling
174 pl'ff- excepts & make the excluded evidence a part of the bill of exceptions.

JNO. M. BREARD, sworn on behalf of plaintiffs, says:

I live in Monroe. I was living here in '75 & '76. I am somewhat acquainted with the lands on Bayou de Siard. I was familiar with the condition of the country in 1876, to some extent.

I knew the lands acquired by John & Charles Chaffe at sheriff's sale in 1876.

I saw a plat of that land that was made by Mr. McLeran. The plat exhibited to me on Notarial Book "W" is a copy of the plat referred to by me.

Not the original itself, to the best of my judgment.

In the fall of 1876 the cash value of that land embraced on that plat, I suppose, was in the neighborhood of about $5,000. According to my best recollection the land embraced on the plat was not in a very good condition in '76.

I believe in 1876 on the pecan grove there was a badly dilapidated log cabin, & also on the back of the place there was another cabin in the same condition.

I don't think there was any other buildings on it at that time than those two cabins.

I don't remember the condition of the fencing in 1876. I know it was pretty bad several years after that.

175 Cross-examined:

My father bought the Warfield tract of land from Mr. Chaffe some time in '79. When he bought it it was in a pretty bad fix. I think it was in a worse condition then than it was in '76. A great deal of the fences in front were gone; not all of them. The fencing was pretty bad all around, all over the place. I don't think I could say there was a fence on the place then that would do to cultivate under. If I am not mistaken, I think the place was unoccupied for a year or more before my father bought. If there was any cultivated I think it was only a small portion of it.

He bought the Warfield part of Bon-air from Chaffe. The deed calls for 1,162 acres to a fraction. The price paid for it was $6,000 cash. I think it was enough for it considering the condition of the place.

I can't say that I considered my father was getting a bargain when he bought that place. I suppose there was at that time about 180 acres cleared land in that place. There has been 40 or 50 acres cleared since that that had not been deadened in 1876.

There is a few acres north of the road, & I suppose there is 150 or 160 acres of cleared land in the main field. I suppose there are

about 20 acres on the north of the road in the pecan grove.
176 There is a pecan grove there. It is mixed with pecans & walnuts. I suppose there is about 75 or 80 pecan trees, & I suppose 15 or 20 walnut trees.

Last year a very few of these trees bore. I don't know whether any of them bore before that or not.

I believe there was some 12 or 15 acres on the back of the place, near the railroad, that had been cult vated.

That pecan grove is considered valuable as it stood in 1876. I could not say that it was worth very much more than any other land, from the fact that the trees were small and not bearing. They had not commenced bearing, that I know of. There was one that had been bearing some time, but, as to the others, I can't say whether they bore in '76 or not. I think pecan trees that would commence bearing in a year or two would add value to the land.

I could not place any value on that pecan grove now. It is my impression that my father bought the land that Chaffe bought.

The deed calls for so many acres, & I can guess pretty well how many acres of open land there is.

There is 1,162 acres in the deed & there is about 240 acres of open land & the rest is wood land. Parts of the wood land is very good.
There is some of it that is low and cannot be cultivated.
177 There is about 200 acres of it that is low and not good. I suppose there is five or six hundred acres that is good. I would consider that which is good first quality of land. It is mixed with gum. Some of the land overflows. I was never there during the overflow. I have heard that some overflows. I don't know whether much or little. I know there is a ridge there that never overflows.

I suppose there ought to be in neighborhood of 200 acres that does not overflow at all. The ridge I speak of is on the south of the railroad. The railroad passes through the land.

The wood land on the north of the road is all good with the exception of a few acres. I would think there was something over 300 acres of wood land north of the railroad. I have no idea how much those wood lands are worth now. I don't know what they were worth in '76 per acre.

My business is clerking. I know the Ingleside property on Bayou de Siard. It adjoins the Bon-air place. I don't know how it adjoins it. I believe I know something about the buildings and improvements on the Ingleside place.

According to my recollection, in 1876 the gin-house &
178 dwelling was in a pretty bad condition. From what I saw from the outside I would conclude that the dwelling was in a bad condition. I never was in it. I am not acquainted with the acreage of the Ingleside place. I know it is cleared back to the railroad. I don't know whether that is the line or not. I believe Ingleside extends over across the bayou north.

ROBERT M. BREARD, sworn for pl'tiff, says:

I live in Monroe. I was raised here. I know the place known as

Kansas now; formerly known as part of Bon-air. I have seen a plat made by Mr. McLeran of Mrs. Warfield's part of Bon-air which was sold in 1876.

I did not know the property very well in '76. That property embraced on that plat I suppose was worth in Sept., '76, about $3,500. I believe the plat embraces about 560 acres. We bought that property since from Mr. Chaffe. I have been over the property since. I don't remember very well the condition of the property in the fall of 1876. Down to the railroad I think the Ingleside place and the Warfield place run about in parallel lines. I think a turnrow divides the two places. I think the Ingleside place is on the
179 west of the Warfield place. I don't know east or west out there. We call the property acquired from Chaffe "Kansas." The dwelling-house on the Ingleside place, to look at it from the road, looked like a very fine dwelling, but I think it was very much dilapidated. I think part of it is brick. I never examined it closely. It looks from the outside like it was plastered. I think the bottom part is brick.

I do not know how much cleared land there is on Ingleside place.

Cross-examined by def't & warrantor:

My father bought the Warfield portion of Bon-air from Mr. Chaffe.

There is something over 1,100 acres mentioned in the deed. I think he gave $6,000 cash. I don't remember very well how much cleared land there was on it. We bought it for more cleared land than there was when Mr. Logan went on it & measured it. We bought it, I think, for 200 acres cleared land & I think it turned out to be 180 acres.

That cleared land is situated right on the public road. There is a few acres of cleared land back on the railroad, about 4 or 5—probably 6 & 7 acres. I don't know how many. It is a small
180 field. We have some few acres across the bayou—I think some 50 or 60 acres—but I don't think any of it is cleared. We have never paid any attention to it.

I don't think there is any wood land on Ingleside except what is called the Cypress break across the bayou. I think some portions of the wood land on the Warfield part of Bon-air is good land. I consider it first-class land. I think the railroad, as far as I can judge, cuts the place in half by a rough estimate. That would leave something like 550 acres north of the railroad; there may be not quite that. We always considered that much. I don't know how much of the wood land is low and subject to overflow. I believe very little went under this year. I rec-on the land south of the railroad is about on the same footing as the other—first quality of land.

Redirect examination:

As far as I can recollect I don't think there is much difference in the value of land in this part of the country in 1876 and now.

Plaintiff offers in evidence—

17. Certified copy of act sale by Henry Shepperd to Her-
181 man Meyer of the Ingleside property on the 3rd Jan'y, 1880.
(Pl'tiffs close.)

Defendants and warrantors offer in evidence—

Act of partition or division of the Bon-air plantation between Mrs. E. W. Warfield and Mrs. E. L. Strother.

Objected to by pl'tiffs, on the ground that it is irrelevant, inadmissible under the pleadings; that if it is offered under the plea of discussion it comes too late, for the reason that the plea of discussion was filed after default taken; & on the further ground already stated in previous objections, and further reason that it is not in rebuttal of anything the pl'ff offered on the reopening of the case; and for the further reason that the introduction of evidence in the case was closed and no further evidence could be offered by defendants, pl'ff having closed his evidence.

Objections overruled; to which ruling pl'ff excepts & reserves this bill of exceptions.

J. T. LUDELING, reappears to make a correction in his testimony, says:

The quantity of land in that portion of Bon-air which belonged
to Mrs. Warfield was stated in my testimony heretofore given
182 as shown by the plat made by McLeran. My impression had
been before that there was more land in the tract than is shown by the deed.

Defend't & warrantor offer in evidence—

Deed from John and Chas. Chaffe to A. G. Breard of the Warfield property, dated 5th Sept., 1879, on page 312 of Notarial Book "X."

Objected to by plaintiffs on the ground that it comes too late, the opening argument by plaintiff's counsel being closed.

Objection sustained & evidence excluded; to which ruling def't & warrantors except, & annex the rejected deed & make it a part of this bill of exceptions.

Evidence closed.

I certify that the above & foregoing is all the evidence adduced on the trial of this case.

Witness my official signature this 26th day of April, 1882.

AUSTIN GREEN,
Clerk D. C.

183 1668. *Petition. Filed* 10 *March*, 1881.

To the hon. the judge of the 5th judicial dist., within & for the parish of Ouachita and State of Louisiana:

The petition of John Chaffe and Charles Chaffe, of the city of New Orleans, respectfully shows that—

In the late 14th district court for your parish, of which your hon-

orable court is the successor, in the suit No. 1020 on the docket thereof, entitled John & Chas. Chaffe *vs.* Mrs. E. W. Warfield, judgment was rendered in favor of the plaintiffs at the March term, 1874, and against defendants, Mrs. E. W. Warfield, for the sum of five thousand dollars, with 8 per cent. per annum interest thereon from the 3rd of May, 1867, and costs of suit, subject to a credit of $2,327.93, dated Feb'ry 3rd, 1872.

That said judgment was duly recorded on the 21st of March, 1874, in Mortgage Book "K," on p. 219, in the office of the recorder of mortgages for said parish and State, and operates thereby and from the date of said record a judicial mortgage upon all the said estate in your said parish then owned by the said defendant, Mrs. Warfield.

That, though an appeal was taken by defendant from said judgment, the same was duly affirmed and became final.

184 That said judgment is properly entitled to a credit of nin-ty-five $\frac{10}{100}$ dollars, 18th Dec., 1876, being the excess of the bid of your petitioner, over and above the debts, interest, cost, and taxes, in the case of Miltenberger & Murrell *vs.* E. W. Warfield, Oliver & Byrne *vs.* E. W. Warfield, and L. D. McLain, ex., *vs.* E. W. Warfield, upon which executions were issued and property of defendant situated on Bayou de Siard and being part of the Bon-air plantation was sold, the amount bid by your petitioner therefor being $3,375.40; and of the bid 3,280.38 was appropriated by the sheriff to the payment of the debts of the said seizing creditors, all of which ranked the claim of your petitioners and thus left in their hands the sum of $95.10 to be applied to their judgment.

That Mrs. E. W. Warfield, defendant, made a voluntary surrender under the national bankrupt law in 1876 or '7, and at the petition of your petitioners as creditors in September, 1879, the real estate placed by her on her schedule was, by order of the United States district court, sold by the assignee of the bankrupt at public sale for the sum of nineteen hundred and thirty-four and $\frac{50}{100}$ dollars; and your petitioners being the purchasers, with the consent of the assignee and the approval of the court, your petitioner was permitted to retain the price of said adjudication and the

185 judgment against Mrs. E. W. Warfield is credited with the said sum of $1,934.50 September 7th, 1879; that said judgment is entitled to no other credits.

That at the date of the record of their judgment as aforesaid, on the 21st March, 1874, the defendant, Mrs. E. W. Warfield, owned and possessed the following real estate in your said parish and State, to wit, the north half of section one, township seventeen north, of range four east, and those portions of the south half of the southeast quarter of section thirty-five and the south half of section thirty six, in township eighteen N., of range three east, which be north of the Vicksburg, Shreveport and Pacific railroad, together containing about five hundred acres, more or less; that J. T. Ludeling, of your said parish and State, claims to own and is in possession of said land and real estate last above described, and that the same is subject to the judicial mortgage of your petitioner for the balance due on their

said judgment after allowing the credits above stated, and your petitioners know of no other property of defendant in the judgment against which their rights can be enforced.

That they have more than thirty days prior to 15th December, 1880, caused execution to issue on their judgment, and no property could be found, and that more than thirty days prior to said 15th December, 1880, they caused demand to be made of the assignee of defendant in bankruptcy without effect, and that on the 15th of December, 1880, John T. Ludeling was formally notified of said demand and default, and that unless the amount due on said judgment was paid by him as third possessor of said land within ten days thereafter proceedings would be commenced to enforce their judicial mortgage against the property above described as in his possession and subject to their said mortgage.

186

That the delay has lapsed and judgment *and judgment* has been made. Wherefore, the premises considered, petitioners pray that the said J. T. Ludeling be duly cited to answer hereto, and, upon a hearing, that they have judgment recognizing their judicial mortgage as above set forth on the land described as in the possession of J. T. Ludeling and decreeing that the same be sold to satisfy their said mortgage, and for cost and for general relief, &c.

STUBBS & STILLMAN, *Att'ys.*

Affidavit.

STATE OF LOUISIANA, }
Parish of Ouachita. }

Before me personally came John Chaffe and Charles Chaffe, who, being duly sworn, say that the facts and allegations set forth in the foregoing petition are true; that the amount claimed therein is actually due, and that they have in vain demanded payment of their judgment debtor more than thirty days before bringing this suit.

187

JOHN CHAFFE.
CHAS. CHAFFE.

Sworn to and subscribed before me this 10 day of February, 1881.

ANDREW HERO,
Notary Pub.

1668. *Answer & Call in Warranty. Filed 8th April,* '81.

Fifth Dist. Court, Parish of Ouachita, State of Louisiana.

JOHN & CHARLES CHAFFE
vs.
JOHN T. LUDELING. } 1668.

The defendants without answering to the merits, except- and says that the plaintiffs are estopped from asserting any right or claim to the north half of section one, T. 17, R. 4 east, for this: that he pur-

chased said property at public auction at the succession sale of the property of the estate of B. H. Dinkgrave, on or about the 15th of February, 1878; that he sued out a monition under the laws of this State, and after one notice and advertisement according to law the said sale was confirmed and homologated and the proceeds of the sale of said property was distributed among the creditors of
188 the succession and the surviving widow.

Defendants aver- that if the plaintiff- had any mortgage, right, or claim of any kind against said property (which is denied) they should have made known their right or claim and have asserted them before the homologation of the monition and before the distribution of the price of the said land by the administrator under orders of the court.

If the exception plea in bar of this action be overruled, then for answer the defendant denies all and singular the allegations of the petition, except such as may be expressly admitted hereinafter. For further answer he avers that Mrs. E. W. Warfield, the alleged judgment debtor of John & Charles Chaffe, owned other lands in the parish of Ouachita at the date of her sale to B. H. Dinkgrave and since, which would be liable for the payment of the alleged judgment of the plaintiff before the lands sold to B. H. Dinkgrave or any lands in the possession of this respondent could be subjected to said judgment, if at all.

He avers that among other lands the following belonged to Mrs. E. W. Warfield at the time of said sale to B. H. Dinkgrave was made, to wit:

189 The "Roberts tract and lot" where residence is, being part of Bon-air, containing upwards of six hundred acres; lots 3 & 4 & S. W. ¼ of sec. 34, T. 18, R. 4 E., containing 232 acres; tract in Carroll parish, in T. 21, R. 12 E., containing 320 acres; the north half of sec. 3, T. 17, R. 4 E.; the north half of sec. 2, T. 17, R. 4 east; the S. E. ¼ & E. ½, T. 17, R. 4 E., and lots 1, sec. 26, & lot 4 or 5, sec. 25, in T. 18, R. 4 east, being lands which she acquired in the partition of the estate of John M. B. Hamlin, her husband, and from Mrs. Fitz and Mrs. Engor by purchase. She owned also the lots in Monroe upon which her residence was, with the outhouses and improvements thereon, and the lot adjoining it on the south and fronting the river and bounded on the south by street leading to the ferry. Defendant reserves the right to point out hereafter other property which belongs to Mrs. Warfield since the sale to Dinkgrave. Defendant hereby signifies his readiness to permit the amount of money necessary to pay the cost for discussing said property.

Defendant further avers that at the time B. H. Dinkgrave acquired said land from Mrs. Warfield she owed a large amount of taxes on said lands and Bon-air plantation and property in Monroe
190 already described, to secure which the State and parish had a first lein or privilege upon said lands, and that the said B. H. Dinkgrave paid said taxes, amounting to the full amount of the price stated in the act of sale from Mrs. Warfield to him. Defendant avers that the succession of the said Dinkgrave and your respondent was subrogated to the rights of the State & parish, so

far as the plaintiffs are concerned, and that the plaintiffs cannot in equity enforce their mortgage against the property before reimbursing the said succession or its assigns the amounts paid by Dinkgrave, which released the property of Mrs. Warfield from a prior *lein* or privilege. Defendant avers that said sum was upwards of thirty-two hundred dollars. Defend't further avers that he and his vendor have made large and valuable improvements upon said lands, and he reserves the right to prove their value and to recover compensation therefor.

For further answer the defendant avers that he is informed & he believes that the sale of Mrs. E. W. Warfield's plantation, known as "Bon-air," was illegal, null, and void; that Mrs. Warfield
191 had gone into bankruptcy at the time, and that the sheriff was coerced by intimidation and threats of personal violence to make the sale and sign the deed, which had been prepared by the plaintiffs or their agent, notwithstanding he had informed the representative of Mrs. Warfield that the sale would not be made, and that no appraisers *was* appointed by her or her assignee, and that the property, which at that time was well worth ten thousand dollars, was bid in by the plaintiffs at about one-third of said value.

Defendants further aver that the said plaintiffs, having, as they say, a judgment for a large amount, permitted certain lots in the town of Monroe to be sold for taxes & bought them in for a mere nominal sum, whereas the said lots were well worth one thousand dollars.

He avers the fact that the debtor had gone in bankruptcy and the assignee had no assets except the lands surrendered, which plaintiffs claimed to be subject to their large judgment, deter-ed others from bidding. He avers that it would be inequitable and wrong to permit the plaintiffs to thus enrich themselves at the expense of others, and that the judgment should in equity be credited with the real value of the lands.

192 Defendant further avers that he was informed by the late Dr. Strother, the son-in-law and agent of Mrs. Warfield, who is also dead, that there was an agreement between the plaintiffs and himself, acting for Mrs. Warfield, that he should pay a certain sum of money, about 50 per cent. of the am't due, in full satisfaction of the judgment, or permit the plaintiffs to purchase the dwelling-house and lots surrendered in full satisfaction of the judgment. He avers that the terms of the compromise were fulfilled and the judgment was satisfied by plaintiffs buying said property at less than its value.

Defendant avers that he has paid the price of the land purchased at the succession sale of B. H. Dinkgrave, and the said succession is bound in warranty to respondent.

He prays therefore that said succession be called in warranty to defend this suit.

Wherefore he prays that William H. Dinkgrave, administrator of the succession of B. H. Dinkgrave, resident of the parish of Ouachita, Louisiana, be called in warranty and cited to defend this suit, and he prays for judgment against him for the price paid and the

value of improvements placed upon the land since his purchase in the event judgment should be rendered against him. He
193 further prays that the plaintiffs' demand be rejected with cost, and for general relief, &c.

JOHN T. LUDELING,
In Pro. Per.

Answer of Dinkgrave, Adm'r, & Call in Warranty. Filed 7th July, '81.

J. & C. CHAFFE
vs.
JOHN T. LUDELING. } 1668.

For answer to the call in warranty by the defendant W. H. Dinkgrave the administrator of the estate of B. H. Dinkgrave adopts the defenses set up by the defendant, and for further answer he avers that the plantation situated on Bayou de Siard, in Ouachita parish, known as "Bon-air," and containing six hundred acres, more or less, is subject to the judicial mortgage of plaintiffs, and must be discussed first before the property acquired by said J. T. Ludeling at the succession sale of B. H. Dinkgrave's property can be made subject to it. He avers that the pretended sale from Sheriff Hamlet to the plaintiffs or J. Chaffe was absolutely null and void, for this:

1st. That the sheriff never seized or took possession of the property and never delivered the same to the pretended purchaser.

2nd. That the return day of the writ *fi. fa.*, under which the
194 sheriff was acting, had expired before the day of sale and no copies thereof were kept by the sheriff or his deputies who made the sale, and the deputy who made the sale had no writ or copy thereof when he made the sale, and he did not have any authority to sell the property.

3rd. That the sheriff or his deputy was advisied by his legal adviser to demand an indemnity bond of the seizing creditors, and they refused or failed to give one, to refuse to sell the property, but in such case, if insisted upon, to sell only such interest as Mrs. E. W. Warfield might have in said property on the day of sale, she having previously gone into bankruptcy, and that the sheriff or his deputy refused to sell the property advertised, but only offered for sale the interest Mrs. Warfield had in said property on the day of sale.

Your respondent avers that he is informed and he believes that the deputy sheriff, in the absence of the sheriff, was threatened by the attorney of J. & C. Chaffe with a suit for damages if he did not make the sale, and after the sale, at about 8 or 9 o'clock p. m. of the day of sale, the deputy who made the sale was, through intimidation & personal violence, made to sign the deed of sale, contrary to his wishes and against the positive instruction of the prin-
195 cipal deputy, who had control of the office in the absence of the sheriff, who had fled from the parish from fear of personal violence. Said deed was signed away from the office of the sheriff without having been read by the deputy who signed it, and

it was written by one of the attorneys of Chaffe, the purchaser, and misrepresented the property offered and sold by the deputy sheriff.

Respondent avers that the property was well worth ten thousand dollars at the date of the sale. Your respondent further avers that the following property is also subject to the mortgage of pl'tiffs, being still the property of Mrs. Warfield or assignee: Lot 4 or W. ½ of S. W. ¼, sec. 25, and lot 5 or E. ½ of S. E. ¼ of sec. 26, and that of the E. ½ of E. ½ of sec. 35 and west half of west half of sec. 36, being north of the N. L. & T. R. R., in T. 18 *R.*, *N.* 4 east, except two acres front on the r'road on the eastern boundery of the property and extending north to the northern boundery of the above-described lands. He avers that the pretended seizure and sale of said property under *fi. fa.* and the pretended purchase thereof by said Stubbs and subsequent donation to Mrs. Strother, the granddaughter of Mrs. Warfield, was a fraudulent contrivance and bald simulation to defraud the creditors of Mrs. Warfield and those who had
196 rights against her. Respondent further avers that a certain lot fronting 60 feet on Grand street, bounded north by Mrs. S. D. McEnery's property, south by McGuire street, east by Walnut street, situated in the city of Monroe, and sold by Mrs. Strother to Sam. McEnery, is also subject to the mortgage, being still the property of Mrs. Warfield or her assignee, as the donation from Mrs. Warfield to Mrs. Strother was made at a time when she was insolvent and greatly in debt, and the subsequent transfers by Mrs. Strother were sales of the property of another and absolutely null and void.

Your respondent avers that even if said sales and transfers cannot now be attacked (which is not admitted), still the plaintiffs, by their laches, negligence, or fraud, cannot enrich themselves at respondent's expense. Your respondent further avers that plaintiffs are estopped from pursuing the property sold at the succession sale, for this, that they neglected to make known their mortgage right or claim and permitted ordinary debts and others, which their mortgage primed, to be paid in due course of administration and thus exhaust the funds of the estate.

Your respondent further avers that B. H. Dinkgrave purchased the said property from Eliza W. Warfield, and that Eliza W.
197 Strother, now a resident of Tusculum, —— county, Tennessee, with the authority & consent of her husband, bound herself as warrantor against all eviction of every kind of said property. Wherefore he prays that she may be cited as warrantor & — be appointed *curator ad hoc* to represent her in this suit, &, in the event that judgment be rendered in favor of plaintiffs, prays for judgment against her for the price paid by said B. H. Dinkgrave, with interest and cost, in the sum of eleven hundred dollars, value of improvements made and placed on said lands.

Respondent further adopts the allegations and prayer of the defendant's answer, and prays that this suit be rejected with cost, and for general relief.

Respectfully,

J. H. DINKGRAVE,
Att'y for Respondent.

1668. *Amended Answer of Adm'r. Filed 6th Aug.*, 1881.

The administrator of the estate of B. H. Dinkgrave, with leave of the court, files this amended answer. He avers that the pretended seizure and sale of Bon-air and Oak Grove plantation-, under which it is pretended Bon-air plantation was seized and sold, was made in the spring of 1875, if made at all; that said *that said* plantations then were leased for ten dollars per acre or $3,000 per annum.

198 Your respondent avers that if a seizure of said places was made (which he expressly denies, as he denied in his original answer), then the rents and revenues of said plantations must have been seized or should have been seized and collected by the sheriff; that if seized the plantation remained under his control until the alleged sale, two years, and the rents alone would have exceeded the amounts of the *fi. fa's* in his hands, & the pretended sale was fraudulent & a mere device & scheme to sell the property at an inadequate price, without the benefit of appraisement, & to the injury of your petitioner. He avers that if a seizure of said plantation was made the rents & revenues thereof should have been taken by the sheriff for the seizing creditors, & the plaintiffs, who were present in person or by counsel urging the sheriff to make the sale, should have seen that the rents were duly collected, & that the surplus thereof and their own bid should be credited on their judgment, if they had a judicial mortgage, as claimed.

He avers that they are estopped from setting up any claims on defendant's property by their laches, neglect, fraud, and conduct in the matter. He further avers that the pretended seizures & sales were made under judgments confessed; that the debtor was

199 in failing circumstances at the time & could not waive appraisement & advertisement of her property; that the pretended sale, if made at all, was null & void, because there was no appraisement of the property, & the pretended price paid was greatly under its true value, & if maintained will be to the injury of your respondent.

Respondent denies that the judgments confessed could have the force & effect of a twelve-months bond, or that the clerk had authority to direct the sheriff to seize & sell property under the judgments as under 12-months bonds, or that the sheriff could lawfully seize & sell property under said executions as if issued on twelve-months bonds. Wherefore, reiterating his allegations in his original answer, he prays that plaintiffs' demand be rejected, & for costs & general relief.

JNO. H. DINKGRAVE, *Att'y.*

1668. *Exception of Mrs. Strother. Filed Oct.* 4, 1881.

5th District Court, Parish of Ouachita, State of La.

JOHN & CHARLES CHAFFE
vs.
JOHN T. LUDELING. } 1668.

Eliza L. Strother makes this appearance in the above suit for no other purpose except to file this her exception, and asks that this suit be dismissed as to her call in warranty on the judgments—

200 1st. That she is not a resident of the State of Louisiana, but a resident of the State of Missouri.

2nd. That she has no property or interest of any kind in the State of Louisiana upon which a judgment against her would be operative; that no personal judgment in the absence of a citation can be rendered against her.

Wherefore she prays to be dismissed with costs of one hundred dollars, to be taxed as a fee to the *curator ad hoc* appointed to represent her.

ROB'T RAY.

1868. *Amended Answer. Filed* 25 *Oct.*, '81.

5th Dist. Court, Parish of Ouachita, State of Louisiana.

CHAFFE
vs.
LUDELING.

The defendant, with leave of the court, for amended answer avers that the Oak Grove plantation, which he acquired at the public sale of the succession of B. H. Dinkgrave, had been seized under writs issued against Mrs. E. W. Warfield at the same time that the alleged seizure of the "Bon-air" plantation is pretended to have been made.

That there was then due by Mrs. E. W. Warfield taxes to the State & the parish amounting to upwards of three thousand five hundred dollars, which were secured by a lien or privilege on all the real estate of said E. W. Warfield.

201 That the said B. H. Dinkgrave agreed to buy said Oak Grove plantation and pay said taxes as the price, provided that the alleged seizure of Oak Grove *were* released by the seizing creditors, which was done; and the said Dinkgrave settled the taxes aforesaid, & thus released the other lands of E. W. Warfield from the encumbrances aforesaid. He avers that said taxes were a prior privilege on said lands to all judicial mortgages; that the payment thereof under the agreement aforesaid released said Oak Grove plantation from all judicial mortgages.

He avers further that, having paid said taxes & extinguished the privilege aforesaid as the price of the purchase of the place, the said Dinkgrave is subrogated to the rights of the State & parish

to said privilege, & your respondent is subrogated to Dinkgrave in the event it should be held that his purchase, under the circumstances, had not relinquished the judicial mortgages.

Wherefore he prays judgment accordingly as in his original answer & for general relief, &c.

JNO. T. LUDELING,
In Pro. Per.

1668. *Amended Answer of Warrantor. Filed Oct.* 25, 1881.

5th Dist. Court, Parish of Ouachita, State of Louisiana.

J. & C. CHAFFE
vs.
J. T. LUDELING.

Wm. H. Dinkgrave, adm'r, called in warranty, with leave
202 of the court, for amended answer, alleges that the Oak Grove plantation, which B. H. Dinkgrave, dec'd, acquired from Mrs. E. W. Warfield, has been seized under writs issued against Mrs. E. W. Warfield at the same time that the alleged seizure of Bon-air plantation is pretended to have been made; that there was due them by Mrs. E. W. Warfield taxes, State and parish, of upwards of three thousand five hundred dollars, which amount of taxes were secured by a lien or privilege on all the real estate of said Mrs. E. W. Warfield; that B. H. Dinkgrave agreed to buy the said Oak Grove plantation & pay said taxes as part of the price, provided the alleged seizure of said plantation was released by the seizing creditors, which was done, & B. H. Dinkgrave settled the taxes aforesaid & thus relieved the other lands of Mrs. E. W. Warfield from the encumbrances aforesaid.

He avers a prior privilege on said lands to all judicial mortgages; that the payment thereof under the agreement aforesaid released said Oak Grove plantation from all judicial mortgages. He avers further that, having paid said taxes & extinguished the privileges aforesaid as part of the price of the purchase of said place, the said
203 Dinkgrave is subrogated to the rights of the State and parish to said privileges in the event that it should be held that his purchase, under the circumstances, *have* not extinguished the judicial mortgage. Whereupon he prays judgment accordingly & as in his original answer & for general relief.

JNO. H. DINKGRAVE, *Att'y.*

204 1168. *Chaffe vs. Ludeling. Judgment of Dist. Court.* 4 *May*, '82.

The State of Louisiana, Parish of Ouachita, 5th Dist. Court.

JOHN & CHARLES CHAFFE
vs.
J. T. LUDELING.

This cause having been regularly fixed and reached in its order, after due trial had it is, by reason of the law and the evidence, or-

dered, adjudged, and decreed that there be judgment in favor of the plaintiffs, John & Charles Chaffee, recognizing the legal mortgages resulting from the registry of their judgment against Mrs. E. W. Warfield in case No. —, on the docket of the late 14th district court for Ouachita, for the balance shown to be due thereon, to wit, for the sum of five thousand dollars, with 8% interest per annum from the 3rd of May, 1867, subject to the several credits shown of $2,327.93, of date February 3d, 1872; of $95.10, 18th December, 1876, and $1,934.50, Sept. 7th, 1879, to rank and take effect from the 21st March, 1874, the date of the record of said judgment in the mortgage records of Ouachita parish, upon the north half of section one, in township 17 north, of range 4 east, in possession of the defendant, John T. Ludeling, and that he either pay this judgment, with the costs hereof, or give up the land to be sold therefor, and that the demand for recognition of the mortgage on those fractions of
205 south half of southeast quarter of section 35 and south half of south half of section 36, T. 18 N., R. 3 E., which lie north of the V. S. & P. R. R., as described in the petition, be rejected; and it is further ordered that defendant pay costs.

It is further ordered and decreed that defendant, J. T. Ludeling, have judgment against the succession of B. H. Dinkgrave, his warrantor, for the sum of two thousand five hundred and fifty dollars, the price paid by J. T. Ludeling for the land on which plaintiff's legal mortgage is herein recognized at succession sale of B. H. Dinkgrave. It is further ordered that the demand in warranty by succession of Dinkgrave against Mrs. E. L. Strother be dismissed as in case of nonsuit.

That the demand of defendant for improvements be dismissed as of nonsuit, reserving his right to sue therefor in a separate and subsequent action, and that the claim of the warrantor succession of Dinkgrave for taxes paid upon the land be allowed for those taxes due and paid by him for the five years preceding the purchase by B. H. Dinkgrave and stated in the certificate of mortgage, aggregating $936.20, and that this amount be paid out of the proceeds
206 of the land when sold in preference to the debt of plaintiffs herein recognized.

It is further ordered that a fee of twenty-five dollars be taxed as costs for the services of Rob't Ray, Esqr., curator *ad hoc*, rendered by E. L. Strother in this court.

Done, read, and signed in open court the 4th day of May, 1882.

W. N. POTTS,
Lawyer Selected to Try this Case.

Mandate. Filed 28 June, '82.

Mandate.

Supreme Court.

MONROE, LA., *June 20th*, 1882.

The court met pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Felix P. Poché, Robert B. Todd, Chas. E. Fenner, associate justices.

The Hon. Associate Justice Charles E. Fenner read the opinion & decree in the following case:

JOHN & CHARLES CHAFFE
vs.
JOHN T. LUDELING. } No. 1057.

Appeal from the district court, parish of Ouachita.

It is therefore ordered and decreed that the judgment ap-
207 pealed from be amended by striking therefrom that portion which allows the warrantor succession of Dinkgrave the amount of $936.20 as taxes paid by him, and *and* directs this amount to be paid by preference out of the proceeds of sale, and that in all other respects the said judgment be affirmed, appellants to pay costs of this appeal.

I, Robert J. Willson, clerk of the supreme court of the State of Louisiana, holding sessions at Monroe, La., do hereby certify the above & foregoing to be a true, correct, and accurate copy of the decree read in said case in open court on the day & date above written & on file & of record in my office.

In testimony whereof I hereunto set my official signature and affix the seal of said court, at the city of Monroe, on this the 28th day of June, 1882.

ROB. J. WILLSON,
Clerk Supreme Court.

A true copy of the original.
[SEAL.] AUSTIN GREEN, *Clerk.*

208 E. W. WARFIELD
vs.
CALHOUN & PARKER. } No. 1305.

Petition. Filed Mar. 5, 1877.

To the honorable the judge of the 14th judicial court in and for the parish of Ouachita, State of Louisiana:

The petition of Eliza W. Warfield, a *femme-sole* resident of your said parish and State, with due respect represents that she has possessed as owner for more than thirty years a tract of land situated in your said parish containing one hundred and sixty acres, lying on the south side of the Bayou de Siard, having a front on said bayou of about twelve arpents, bounded on the north by the said bayou, on the west by the line which separates her said land from the Ingleside plantation, on the east by the lands of Eliza L. Strother and running back between said lines so as to include one hundred and sixty acres, excluding from the measurement the family grave-
209 yard, one and a half acres, and also excluding the public road which runs across the same. Petitioner avers that she has had the actual possession of said land for over thirty years and has still the actual possession of the same except as hereinafter stated; that said possession has been quiet and without in-

terruption as owner for over thirty years prior to the first day of January, 1877.

Petitioner represents that within the year 1877 Charles H. Calhoun and Millard T. Parker, both residents of your said parish, have through force and violence taken possession of a part of her land, about one hundred and thirty acres, driving therefrom her tenants, and have also ordered her tenant off the land and fixed a time for him to leave, and have otherwise thrown obsticles in the way of her enjoyment of her possession of her property; have by threats disturbed her through her tenant in her possession
210 of her said property, by which acts and doings of the said Calhoun and Parker she has suffered a real disturbance in fact and been prevented from enjoying her possession quietly and has been damaged in possession, deprivation of revenue in her old age, insult, and injury to her feelings to the amount of five hundred dollars.

Petitioner further avers that the said Calhoun and Parker have disturbed her in the actual possession which she has had of the above property for more than thirty years, and that an injunction is necessary to prohibit the said parties from further disturbing her in her possession and enjoyment of her said property, and that the setting aside of said injunction would work her an irreparable injury.

Wherefore she prays your honor to cause the said Charles
211 H. Calhoun and Millard F. Parker to be cited to appear in your honorable court and answer hereto; that on a final hearing she have judgment *in solido* against Calhoun and Parker, quieting her in her possession of her above-described property; that she also have judgment against the said parties *in solido* for five thousand dollars damages; that an injunction issue commanding and prohibiting the said Calhoun and the said Parker, each and both, from disturbing her or her tenants in the possession, and that the said mandate of injunction be not set aside, and that your honor fix the amount of the bond she is to give to obtain said injunction; and, further, that on a final trial said injunction be made perpetual, and for all such orders and decrees as the nature of the case requires and for general relief in the premises.

COBB & GUNBY, *Att'y-*.

212 1305. *Affidavit.*

STATE OF LOUISIANA, }
Parish of Ouachita. }

Before the undersigned authority personally came and appeared Mrs. Eliza W. Warfield, *femme sole*, who deposed that the allegations in the foregoing petition are true, and the facts stated are also true, and in her opinion render an injunction necessary, and that the judge of the district is absent from the parish.

ELIZA W. WARFIELD.

Sworn to and subscribed before me this 5th day of March, 1877.

R. B. VINSON, *J. P.*

1305. *Order.*

The within petition and affidavit being considered, it is ordered that an injunction issue as prayed for upon petitioner executing bond conditioned according to law in the sum of seven hundred dollars; being satisfied that the judge of the dist. court is absent from the parish, this order is granted by me in chambers, this fifth day March, 1887.

A. L. SLACK, *P'h Judge.*

213 1305 *Judgment. Filed 17th June,* '78.

14th District Court, Parish of Ouachita, State of Louisiana.

ELIZA W. WARFIELD
vs.
CALHOUN & PARKER. } No. 1305.

By reason of the law and the evidence in this case being in favor of the defendant and against the plaintiff, and for reasons set forth in the written opinion of the court, it is ordered, adjudged, and decreed that the demand of the plaintiff, Mrs. Eliza W. Warfield, be rejected, and that she pay all cost of these proceedings, and that there be judgment in favor of the defendants, Charles H. Calhoun and Millard F. Parker, maintaining and quieting their possession of the land described in the plaintiff's petition. Read and signed in open court on this the 17th day June, A. D. 1878.

(Sg.) G. PARSONS,
Judge 14 *Dist.*

214 1305. *Answer. Filed* 1 *June,* '77.

Fourteenth District Court, Parish of Ouachita, State of Louisiana.

ELIZA W. WARFIELD
vs.
CALHOUN & PARKER. } No. 1305.

The defendants, Charles H. Calhoun and Millard F. Parker, before answering the plaintiff's petition, except perem-torily thereto on the grounds hereinafter set forth; and after pleading the said exceptions they, for answer to the plaintiff's petition, deny all the allegations contained therein except such as may be hereinafter admitted.

For further answer they aver that in the month of December, 1876, they verbally leased the land described in the plaintiff's petition from John and Charles Chaffe, through an agent, William W. Farmer, and on the 16th day of January, 1877, the lease of said land was made notarial in form by act passed before the recorder of said parish, a certified copy of which is hereto annexed and made part hereof.

Defendants further aver that the said John and Charles
215 Chaffe, who are residents of the city of New Orleans, State of Louisiana, acquired said property with other property at a

sheriff's sale made on the 16th day of September, 1876, by S. W. Wood, deputy sheriff of the parish of Ouachita, under and by virtue of three writs of *fieri facias* issued in the following cases, to wit:

1st. Case No. 994, district court of Ouachita parish, entitled A. Miltenburger & Co. and J. W. Murrell *vs.* Eliza W. Warfield *et al.*, to wit, Eliza L. Strother & R. C. Strother.

2nd. Case No. 995, district court of Ouachita parish, entitled Oliver & Byrne *vs.* R. C. Strother *et al.*, to wit, Eliza Strother, Eliza W. Warfield.

3rd. Case No. 644, parish court of Ouachita parish, entitled L. Dawson McLain, executor, *vs.* Eliza W. Warfield.

Defendants further aver that under said writ the sheriff of said parish did on the 20th day of February, 1876, seize and take into
his possession the property described in the plaintiff's peti-
216 tion, together with other property, and did on the 3d day of
March, 1875, advertise for sale the property seized by advertisement in the official journal of said parish; sale to take place on the 3d of April, 1875.

Defendants further aver that on the said third day of April, 1875, the said Eliza W. Warfield sued out an injunction in the case No. 1231 in this honl. court, entitled E. W. Warfield *vs.* J. B. Hamlet, sheriff, *et al.*, *with* injunction stayed further proceedings under said writs until its final dissolution; that said injunction was put at issue and regularly tried before a jury, and judgment in the district court dissolving said injunction with damages against Eliza W. Warfield and securities was rendered and signed September 29th, 1875, as to the writs in the cases 1st & 2d named above, the injunction against
the writ in the 3d-named case having been dissolved or ex-
217 ception by judgment signed Sept. 26th, 1875; that said Mrs.
Warfield and her securities appealed from said judgment by order granted October 23d, 1875, on a petition which was filed Oct. 25th, 1875, and by suspensive appeal bond dated and filed Oct. 25th, 1875; that said suspensive appeal supplied said judgments of dissolution and continued said injunctions in force until the 20th day of July, 1876, on which date the clerk of the supreme court of Louisiana certified that the said appeal had not been filed in that court.

Defendants further aver that, the said injunctions being finally dissolved, the said sheriff readvertised for sale the said property by advertisement in said official journal published from Aug. 13th, 1876, to September 16th, 1876. The aforesaid deputy sheriff sold said
property, according to law, to said John and Chas. Chaffe and
218 delivered same to them and made them a deed in due form,
which was recorded Sept. 18th, 1876, in the notarial records of the parish office. Defendants annex hereto the said writs of *fieri facias* and copies thereof and sheriff's return thereon, the said advertisement, and the sheriff's deed, and make the same parts hereof, together with the recorder's certificate of the filing and recording thereof in his office.

Such being the history of the possession of said property by these defendants, they now except perem-torially to the plaintiff's action on the following grounds, to wit:

1st. The plaintiff, Eliza W. Warfield, publicly and solemnly declared, acknowledged, and admitted in the said injunction suits—solemn judicial proceeding—that in said suit "George B. Hamlet, sheriff of your said parish and State, has seized, advertised for sale on Saturday, the third day of April, 1875, the property de-
219 scribed in the annexed advertisement, taken from the Louisiana Intelligencer, a newspaper and the official journal of this parish; which advertisement is made part of this petition to show the description of the land and quantity seized;" which allegation is made in her petition in the language quoted; and the farther allegation is made in said petition that the property seized is well worth fifteen thousand dollars.

Defendants further aver that on the 31st day of March, 1875, the said Mrs. E. W. Warfield made affidavit before the judge of said district court to obtain said injunction and subscribed *his* name thereto, in which she solemnly swore that all the facts and allegations in the petition (except the amount of damages) are true and correct; which allegations and oath thereto constitute a solemn judicial admission that said property had been seized by the sheriff under said writs, and that
220 her possession was thereby divested; and defendants aver that she is estopped by said judicial admission from alleging that her possession was not divested by said seizures, and they plead estoppel as a perem-tory exception to the plaintiff's action herein; that the plaintiff was bound to know and did know that the aforesaid proceedings, seizures, and sales were validly made, and that the deed aforesaid was duly passed and recorded in the conveyance book of Ouachita parish, and the law does not permit her to attack said sale in this form of proceeding which she does attack in fact, and really, though indirectly and collaterally, but the said sale can be attacked only by a direct action to annul same contradictory with the purchasers, John and Charles Chaffe.

3d. Though not stated so in her petition, defendants believe, from a statement made in open court by one of her attorneys, R.
221 G. Cobb, to the effect that this is on action of homestead, that plaintiff intends to attempt the ma-ntainance of this suit by claiming that the land described by her in this petition is her homestead and exempted from the said seizures and sale as such. Defendants deny such issue, but, if permitted to be raised, they aver that the question of such homestead right or exemption was expressly raised in said injunction suit as one of the grounds of injunction, was expressly put at issue in defendants' answers in said suit, evidence was introduced thereon, and the question was passed upon and decided in said case by the verdict of plaintiff to said homestead right or exemption, and the question is *res judicata* against said claim.

4th. The property described in plaintiff's petition is the same which makes lots No. 1, 6, 7, & 15 on the plat of survey attached to said sheriff's deed and about two-fifths of lots No. 2, 5, 8, &
222 14 of said plat on the northern end of said last-named lots.

Said land as shown by said deed realized ten dollars per acre,

amounting to sixteen hundred dollars, which was applied to the payment of these debts of Mrs. E. W. Warfield upon which said writs issued. Defendants aver that she cannot be permitted to attack the sale thereof, directly or indirectly, before she has refunded to said John and Charles Chaffe the said sum of sixteen hundred dollars, or tendered said sum to them, and deny *deny* that she has refunded said sum to them or offered to do so, and they plead said want of refunding and of tender as a perem-tory exception herein to plaintiff's action.

Defendants, farther answering, aver that they are in actual possession and have been in possession of all said land lying below the public road, and in possession of all that portion lying above said road, through this tenant, to whom they sublet same and
223 who owes them the rent therefor; they deny that they have done any tortious or illegal act, but aver that they are and have been in good faith; they aver that the plaintiff has no justification in law or equity for this suit; that she is acting in bad faith, but her proceedings are induced by the machinations of her son-in-law, W. J. Q. Baker, and her grandson-in-law, R. C. Strother, who have instituted this suit for the sole pur*pur*pose, as they believe and assert, of confusing the questions concerning said land, and, by litigation, of endeavoring to force John Chaffe and Charles Chaffe to make a compromise with Mrs. Warfield or with some one for her of their rights to said land and other lands of other claims they have against her; they deny that they have in any manner damaged her or interfered with any of her rights, but allege that she has unlaw-
224 fully and improperly dragged them into this lawsuit without the shadow of a right or justice in her demands.

Wherefore defendants pray that the demands of the plaintiff, Mrs. E. W. Warfield, be rejected, and that they be quieted in their possession of said land, and that she be decreed to pay all costs of this suit; and they pray for general relief.

W. W. FARMER, *Attorney.*

Act of Sale, Mrs. Warfield to Dinkgrave, 30 June, '75.

STATE OF LOUISIANA, }
Parish of Ouachita. }

Be it known that on this the 30th day of June, A. D. eighteen hundred and seventy-five, before me, Francis A. Hall, deputy recorder and *ex officio* notary public in and for the said parish and State, personally came and appeared Mrs. Eliza W. Warfield, a *femme sole*, a resident of said parish and State, who declared and ac-
225 knowledged that for the price hereinafter expressed she has sold, conveyed, and delivered, and by these presents does sell, bargain, transfer, assign, and set over, unto Bernard H. Dinkgrave, of same residence, present and accepting this sale for himself, his heirs and assigns, the following property, to wit:

The north half of section one, township seventeen north of range four east, and all that part of sec. 36, T. 18 N. of R. 4 E., which

lies south of the Vicksburg, Shrevesport and Texas railroad, situated in said parish and State, and known as the Oak Grove plantation, containing four hundred and thirty acres, more or less, together with all the buildings and improvements thereon; to have and to hold the said property unto the said purchaser, his heirs and assigns forever.

The parties to this act agree to dispense with the production of the certificate of mortgage required by article 3364 of the Civil Code of this State and exonerate me from any liability in the premises.

226

The price for which the above sale is made is the sum of thirty-seven hundred and eighty-two $\frac{36}{100}$ dollars cash to her in hand paid, receipt whereof she hereto acknowledges.

Thus done and passed in the parish of Ouachita, in presents of Lewis F. Lemy & James S. Ray, witnesses of lawful age and domicile, who hereto sign their names, together with the said parties and me, the said recorder, on this 30th day of June, A. D. 1875.

ELIZA WARFIELD.
B. H. DINKGRAVE.

LOUIS F. LAMY.
J. S. RAY.

FRANCIS A. HALL,
Deputy Recorder.

And to these presents personally came and appeared Mrs. Eliza L. Baker, wife of Robert C. Strother, both residents of said parish and State, she herein authorized, aided, and assisted by her said husband, who declares that in addition to the warranty of the vendor she does hereto obligate herself, her heirs and assigns, to warrant and defend the title of said Dinkgrave to the lands hereinbefore described and transferred against all claims whatsoever.

227

In testimony whereof the said Mrs. Eliza L. Strother and Robert C. Strother have hereinto signed their names, together with Louis F. Lamy and James S. Ray, legal and competent witnesses, and me, deputy recorder, on this 30th day of June, A. D. 1875.

ELIZA L. STROTHER.
R. C. STROTHER.

LOUIS F. LAMY.
J. S. RAY.

FRANCIS A. HALL,
Deputy Recorder.

J. & C. CHAFFE
vs.
E. W. WARFIELD. } 1020.

Petition Original. Filed Sept. 4th, 1872.

To the honl. the judge of the 14th judicial district court in and for the parish of Ouachita, State of Louisiana:

The petition of John Chaffe and Charles Chaffe, of the parish of

Orleans, late commercial partners trading and doing busi-
228 ness under the firm name and stile of John Chaffe and Brother, now selling and liquidating their old business as their own liquidators, with respect shows that Mrs. Eliza W. Warfield, of your said parish and State, is legally and justly indebted to them in the sum of five thousand dollars, with interest at the rate of eight per cent. per annum from the third day of March, eighteen hundred and sixty-seven, till paid, subject to a deduction of twenty-three hundred and twenty-seven & $\frac{93}{100}$ dollars, to take effect on the 3d of February, 1872, for this: On the 3d May, 1867, the said Mrs. Eliza W. Warfield made, signed, and executed her certain promissory notes, payable on the 3d May, 1872, or five years after date, with eight per cent. interest thereon from date till paid; which note was endorsed in blank by the payee, W. J. Q. Baker, and passed to your petitioners, long before its maturity, for a valuable consideration.

Which note is annexed and made a part hereof.

They further show that for the payment of said note there
229 exists a vendor's privilege on a lot of steam machinery and the right of use and of way to and over a certain tract of land: all which is fully described and detailed in the act of sale hereto annexed and made a part hereof, marked one.

They aver that the gin-house described in said act has been burned, but that the machinery is still there on the land.

They aver that the ballance of said note, as stated above, is still due to them, notwithstanding amicable demands have been made for payment thereof.

Wherefore they pray that you cause the said Mrs. Eliza Warfield to be duly cited to answer hereto and upon a trial hereof that they have judgment against her for the sum of five thousand dollars, with eight per cent. interest thereon since the 3d of May, 1867, till paid, less $2,327.90 deducted from said note February 3d, 1872, and cost of this suit, and three dollars and 50 cents cost of copy and fifteen dollars of stamping.

They also pray that the vendor's privilege be allowed, recog-
230 nized, and enforced on all the steam machinery and tackle belonging thereto; also to the right of use and of way on the land described in the act marked "one," hereunto annexed.

They also pray for general relief.

MORRISON & FARMER, *Att'y-*.

231 1020. *Judgment*, 20 *March*, '74.

14 Judicial District Court, Parish of Ouachita.

JOHN CHAFFE and CHARLES CHAFFE
vs.
Mrs. ELIZA W. WARFIELD, W. I. Q. BAKER, Intervenor.

By reason of the law and the evidence in this case being in favor of the plaintiff- and against the defendants and intervenor after a trial on the merits, it is ordered, adjudged, and decreed that the

plaintiffs, John Chaffe and Charles Chaffe, do have and recover of the defendants, Mrs. Eliza W. Warfield, the sum of five thousand dollars, with eight per cent. interest thereon since the 3d of May, eighteen hundred and sixty-seven, till paid, subject to a credit or deduction of two thousand three hundred and twenty-seven dollars and $\frac{93}{100}$ ($2,327$\frac{93}{100}$), to take effect and date from the (3d) third day of February, eighteen hundred and seventy-two, and for cost of this suit, including three dollars and $\frac{50}{100}$, cost of copy, and fifteen dollars' cost of stamping the original act of mortgage.

It is further ordered, adjudged, and decreed that the vendor's privilege and mortgage be recognized upon all the steam machinery belonging thereto, also on the right of use and way described as a tract of four acres, two acres on Bayou de Siard by two acres
232 deep, and the right *and the right* of way sixty feet wide out south to the public road, on a tract of land owned by Mrs. Eliza W. Warfield, in the point near the old family residence on what is known as the Fitz tract, and rendered executory.

It is further ordered, adjudged, and decreed that there be judgment against W. I. Q. Baker, intervenor, and that the intervention be dismissed at his costs.

Read and signed in open court on this 20th of March, 1874.

ROB'T RAY,
Judge 14 *Dist. Court.*

Succ'n of Mrs. Warfield. Petition for Appointment of Green as Adm'r.

To the honorable the judge of the 5th judicial district court within & for the parish of Ouachita and State of Louisiana:

The petition of John & Charles Chaffe, of the city of New Orleans, who composed the late commercial firm of John & Charles Chaffe, with its place of business in New Orleans, but which is now in liquidation, shows that they are judgment creditors of the late Mrs. E. W. Warfield, of your said parish and State, for a large sum.

That judgment was rendered in the late 14th district court for your said parish, of which your honorable court is the successor by law, in the case, No. 1020, of John & Charles Chaffe *vs.* Mrs.
233 E. W. Warfield, at the March term, 1874, in favor of plaintiff for the sum of $5,000, with 8 per cent. interest from 3rd May, 1867, and cost, less credit of $2,327.93 *dollars*, 3rd Febr'y, 1872, as will appear by copy of said judgment duly recorded on 2d March, 1874, in the mortgage record of your said parish; that a portion of said debt has been realized, but that a balance is yet due on said judgment of more than three thousand dollars, which is due and unpaid, and that the def't in said judgment is their debtor to said balance or whatever is the real balance due.

That Mrs. Warfield has departed this life, and, so far as petitioner is informed, has no assets, but that the succession is composed principally, if not entirely, of debts.

That it is important for the interest of petitioner that said succession should have a representation.

That the succession is so small and so much in debt that no one will apply for or is willing to accept the curatorship or administration of the succession of Mrs. Warfield, and that no one demands the nomination, and that the succession is worth less than five hundred dollars, and that her former domicile was in your said parish and State.

234 Wherefore petitioner prays that Austin Green, clerk of your honorable court, under the provisions of law, be ordered to assume the administration of the succession of Mrs. Elizabeth W. Warfield, deceased, late of your said parish, and for all such further orders and decrees as the nature of the case may require, & for general relief, &c.

FRANK P. STUBBS, *Att'y.*

Oath.

F. P. Stubbs, being sworn, deposes that John & Charles Chaffe are both absent; that the facts and allegations set forth in the foregoing petition for administration of succession of Mrs. E. W. Warfield are true to the best of his knowledge and belief.

F. P. STUBBS.

Sworn to and subscribed before me this 8th February, A. D. 1884.

R. W. RICHARDSON,
Judge 5 Dist.

Order Authorizing Green to Administer, &c.

The foregoing application being considered, it is ordered that Austin Green, clerk of the 5th district court for Ouachita parish, assume the administration of the succession of the late Mrs. E. W. Warfield, and that he take such proceedings as the law requires.

Done & signed in chambers this 8th day February, A. D. 1884.

R. W. RICHARDSON,
Judge 5th Dist.

235 *Oath of Green as Adm'r.*

I, Austin Green, clerk of the 5th dist. court within and for the parish of Ouachita and State of Louisiana, pursuant to law & of the order of the judge of said court, hereby as such clerk assume the administration of the succession of Mrs. E. W. Warfield, deceased, late of said parish and State, and I do solemnly swear that I will discharge and perform to the best of my ability all the duties incumbent on me as such administrator, so help me God.

AUSTIN GREEN.

Sworn to & subscribed before me this 8th Febr'y, A. D. 1884.

R. W. RICHARDSON,
Judge 5th Dist.

1020. *Petition for Revival. Filed 9th Feb'y*, 1884.

To the honorable the judge of the 5th judicial district court within and for the parish of Ouachita and State of Louisiana:

The petition of John & Charles Chaffe, both residents of the city of New Orleans, where they were formerly engaged in a commercial bussiness under the firm name of John & Charles Chaffe, but which said business is now in process of liquidation, respectfully shows that they are the plaintiffs in the suit No. 1020 on the docket of the late fourteenth judicial district court within and for your said
236 parish & State, entitled John Chaffe & Charles Chaffe *vs.* E. W. Warfield; that judgment was duly rendered and signed in said cause by Rob't Ray, judge of said court, in petitioners' favor and against defendant on 20th March, 1874, for the sum of $5,000, with 8 per cent. interest per annum from 3rd May, 1867, and cost, less a credit of $2,327.93 paid 3d February, 1872, as will appear by reference to the original judgment in said case, to which reference is herein specially made for your certainty.

That your honorable court is the legal successor of the late 14th judicial district and as such has charge of its records & jurisdiction of its business.

That they are desirous of having their said judgments revived, as a large proportion of the same is yet unpaid and unsettled.

That since the rendition of said judgment the defendants, Mrs. E. W. Warfield, on her own application was adjudged a bankrupt in the United States court for district of Louisiana under the act of Congress expired March 2d, 1867, to establish a uniform system of bankrupt's estate, and that, having qualified as such, the said assignee has never been discharged from his trust, but continues yet
237 as such assignee, and has his domicil in your said parish; that the said bankrupt has never applied for or been discharged from her debts; that since her said surrender the said Mrs. E. W. Warfield, the original defendant, has departed this life, leaving some descendants who are heirs to her estate if she died possessed of any assets; that of her descendants and heirs only Mrs. Eliza Strother, widow, now, as petitioner is informed, residing in St. Louis, Missouri, is known to your petitioner, and if the said descendants are in any sense the representatives of the deceased defendant, then that a *curator ad hoc* is necessary, as none of them reside in the State of Louisiana; that under authority of law Austin Green, clerk of your honorable court under the law and an order of your said court, has assumed the administration and qualified as administrator of the estate and succession of Mrs. E. W. Warfield.

Wherefore petitioners pray that a *curator ad hoc* be appointed to represent the absent heirs of Mrs. Warfield; that said curator be cited to answer hereto; that Austin Green, clerk and administrator of Mrs. E. W. Warfield and W. T. Atkins, assignee, be duly cited, and, on due trial had, that the said judgment in case 1020,
238 rendered 20th March, 1874, and affirmed by supreme court on appeal, be revived and renewed; and they finally pray for cost and for general relief, &c.

F. P. STUBBS, *Att'y.*

Let R. G. Cobb, Esqr., att'y-at-law, be appointed *curator ad hoc* to represent the absent heirs of the late Mrs. E. W. Warfield, and especially Mrs. Eliza Strother, residing in the State of Missouri.

Done & signed in chambers this 9th Feb'ry, 1884.

R. W. RICHARDSON,
Judge 5th Dist.

1020. *Acceptance of Service, &c.*

Service of this petition for revival and of citation waived without waiving time this 9th Feb'ry, 1884.

AUSTIN GREEN,
Clerk D. C. & Administrator of the Succession of E. W. Warfield.
R. G. COBB,
Att'y & Curator ad Hoc.

1020. *Citation to Wm. T. Atkins, 9 Feb'y, '84.*

The State of Louisiana, Parish of Ouachita, 5th Dist. Court.

JOHN & CHARLES CHAFFE
vs.
E. W. WARFIELD. } No. 1020.

To William T. Atkins, assignee of Mrs. E. W. Warfield, of the parish of Ouachita:

You are hereby commanded either to comply with the de-
239 mand contained in the petition, of which a certified copy accompanies the citation or to deliver your answer in writing to said petition in the office of the clerk of the 5th dist. court in and for the parish of Ouachita, which office is in the city of Monroe, said parish and State, within ten days after the service of this citation.

Witness the Honorable R. W. Richardson, judge of the said court, this the 9th day of February, A. D. 1884.

AUSTIN GREEN,
Clerk 5th Dist. Court.

1020. *Service of Citation.*

JOHN & CHARLES CHAFFE
vs.
E. W. WARFIELD.

Received this citation, together with a certified copy of the same and a certified copy of the original petition, in office on the 9th day of February, A. D. 1884, and on the 9th day of February, A. D. 1884, I made personal service of citation and petition by delivering the said certified copies to W. T. Atkins, assignee, defendant, in person, in the parish of Ouachita, La., at his residence in Monroe, La., about — miles from the court-house.

J. E. HANNA,
D'y Sheriff of Ouachita, La.

Sheriff's fees:
Service of petition & citation ---- 2 00
2 00

240 1020. *Minutes.*

MONDAY, *Febr'y* 18*th*, 1884.

Court opened pursuant to adjournment.
Present: Hon. R. W. Richardson, judge; Austin Green, clerk; J. P. Bonar, d'y sh'ff.

JNO. & CHAS. CHAFFE *vs.* Mr. E. W. WARFIELD. } 1020.

Answer of *curator ad hoc* filed.
Answer of Green, ad'm'r, filed.
Answer of Atkins, assignee, filed.
Case set for Tuesday, 19th inst.

TUESDAY, *Febr'y* 19*th*, 1884.

Court opened pursuant to adjournment.
Present: Hon. R. W. Richardson, judge; Austin Green, clerk; J. B. Bonar, d'y sh'ff.

JOHN & CHARLES CHAFFE *vs.* Mrs. E. W. WARFIELD. }

Case taken up for trial and judgment for plaintiffs.
See decree.

1020. *Answer of Green, Adm'r. Filed Feb'y* 18, '84.

5th Dist. Court, Parish of Ouachita, State of Louisiana.

JOHN & CHARLES CHAFFE *vs.* E. W. WARFIELD. } No. 1020.

Austin Green, administrator of the succession of Mrs. E. W. Warfield, made defendant herein, for answer, denies all and singular the allegations of plaintiffs' petition. Wherefore he prays to
241 be hence dismissed with cost.

AUSTIN GREEN, *I. P. P.*

1020. *Answer of Atkins. Filed Feb.* 18, '84.

Fifth District Court, Parish of Ouachita, Louisiana.

JOHN & CHARLES CHAFFE *vs.* E. W. WARFIELD. } No. 1020.

Wm. T. Atkins, assignee of the bankrupt estate of Mrs. E. W.

Warfield, made defendant in the above styled and numbered suit, for answer to plaintiffs' petition, denies each and every allegation therein contained, and will require strict proof of the same.

Wherefore he prays that plaintiff's demand be rejected for cost and general relief.

POTTS AND HUDSON, *Att'ys.*

1020. *Judgment Copy.* 20 *Feb'y*, '84.

State of Louisiana, 5th Dist. Court, Parish of Ouachita.

JOHN & CHARLES CHAFFE
vs.
Mrs. E. W. WARFIED. } No. 1020.

This case being reached in due order, having been fixed for trial after issue joined, and having regularly been tried, by reason of the law and the evidence being in favor of the plaintiffs, John and Charles Chaffe, it is ordered, adjudged, & decreed that the judgment
242 in this case rendered on the 10th March, 1874, in the 14th judicial district court within and for the parish of Ouachita by Robert Ray, judge of said court (this the 5th district court, under the constitution of 1879, being the successor of said 14th judicial district court), in favor of the plaintiffs, John Chaffe and Charles Chaffe, and against the defendants, E. W. Warfield, for the sum of five thousand ($5,000.00) dollars, with 8 per cent. interest from the 3d day of May, 1876, and costs, less a credit of two thousand three hundred and twenty-seven & $\frac{93}{100}$ ($2,327.93) dollars paid 3d February, 1872, be, and the same is, revived from the date hereof.

It is further ordered that a fee of ten dollars for R. G. Cobb, appointed as *curator ad hoc*, be taxed as cost, and that the defendant pay all the cost of this suit.

Done, read, and signed in open court this 20th day of February, A. D. 1884.

R. W. RICHARDSON,
Judge 5th Dist. Court.

A true copy of the original.

AUSTIN GREEN, *Clerk.*

1020. *Judgment Copy.* 21 *Mar.*, '74.

State of Louisiana, 14th Dist. Court, Parish of Ouachita.

JOHN CHAFFE and CHARLES CHAFFE
vs.
Mrs. E. W. WARFIELD, W. J. Q. BAKER, Intervenor. } No. 1020.

243 I hereby certify that judgment was rendered in the above-entitled cause at the March term, A. D. 1874, of the 14th district court in and for said parish and State in the words & figures following, to wit:

By reason of the law and the evidence in this case being in favor

of the pl'tiff- and against the defendants and intervenor, after a trial on the merits, it is ordered, adjudged, & decreed that the plaintiffs, John Chaffe and Charles Chaffe, do have and recover of the defendant, Mrs. Eliza W. Warfield, the sum of five thousand dollars, with eight per cent. interest thereon since the 3rd day — May, eighteen hundred and sixty-seven, till paid, subject to a credit or deduction of two thousand three hundred and twenty-seven dollars and $\frac{93}{100}$ ($2,327.93) to take effect and date from the (3rd) third day of February, eighteen hundred and seventy-two, and for cost of this suit, including three dollars & $\frac{50}{100}$, cost of copy, and fifteen dollars, cost of stamping the original act of mortgage. It is further ordered, adjudged, and decreed that the vendor's privilege and mortgage be recognized upon all the steam machinery and tackles belonging thereto; also on the right of use and way described as a tract of four acres, two acres on the Bayou de Siard by
244 two acres deep, and the right of way sixty feet wide and south to the public road on a tract of land owned by Mrs. Eliza W. Warfield in the point near the family residence, on what is known as the Fitz tract, and rendered executory. It is further ordered, adjudged, and decreed that there be judgment against W. J. Q. Baker, intervenor, and that the intervention be dismissed at his cost. Read and signed in open court on the 20th of March, 1874.

ROBT. RAY,
Judge 14 *Dist.*

Witness my hand and seal of said court on this the 21st day of March, A. D. 1874.

JULIUS ENNEMOSER, *Clerk D. C.*

1020. *Inscription of Judgment.*

JOHN CHAFFE and CHARLES CHAFFE
vs.
E. W. WARFIELD, W. J. Q. BAKER, Intr. } No. 1020.

Filed March 21st, 1874, and recorded in Mortgage Book K, pages 219 & 220. In testimony whereof I hereunto sign my name and affix my seal of office the date above filed.

M. M. GRADY, *Recorder.*

1668. Filed evidence April 21st, 1882.

AUSTIN GREEN *Clerk, D. C.*

245 1020. *Reinscription of Judgment.*

E. W. Warfield to John Chaffe & Charles Chaffe. Reinscription of judgment filed Feb'ry 18th, 1884, and duly reinscribed in Mortgage Book R, page 535.

I. GARRETT,
D'y Clerk.

1020. *Answer of Cobb, Curator. Filed 18th Feb'ry, '84.*

5th Judicial District Court, Parish of Ouachita, State of Louisiana.

JOHN & CHARLES CHAFFE
vs.
E. W. WARFIELD.

R. G. Cobb, att'y appointed by the court *curator ad hoc* to represent the absent heirs of Mrs. E. W. Warfield, dec'd, respectfully — Mrs. E. L. Strother, denies all and singular the allegations in pl'tiffs' petition contained, & will require strict legal proof of same.

Wherefore he prays that pl'tiffs' demands be rejected with cost, and that the court tax a fee of ten dollars as attorney's fees as such cost, &c.

R. G. COBB,
Att'y & Curator ad Hoc.

1020. *Judgment of Revival. Filed 20 Feb'ry, '84.*

State of Louisiana, 5th Dist. Court, Parish of Ouachita.

JOHN & CHARLES CHAFFE
vs.
E. W. WARFIELD. } 1020.

This case being reached in due order, having been regularly fixed for trial after issue joined, and having been tried, by reason
246 of the law and the evidence being in favor of the plaintiffs, John & Charles Chaffe,

It is ordered, adjudged, and decreed that the judgment in this case rendered on the 20th of March, 1874, in the 14th judicial district court within and for Ouachita parish, by Rob't Ray, judge of said court, this the 5th district court, under the constitution of 1879, being the successor of said 14th judicial district court, in favor of the p'ltiffs, John Chaffe and Charles Chaffe, and against the defendant, E. W. Warfield, for the sum of five thousand ($5,000.00) dollars, with 8 per cent. interest from the 3rd of May, 1867, and costs, less a credit of two thousand three hundred and twenty-seven and $\frac{93}{100}$ ($2,327.93) dollars paid 3d February, 1872, be, and the same is, revived from the date hereof.

It is further ordered that a fee of ten dollars for R. G. Cobb, appointed as *curator ad hoc* herein, be taxed as cost, and that the defendants pay all the cost of this suit.

Done, read, and signed in open court this 20th day of February, A. D. 1884.

R. W. RICHARDSON,
Judge Fifth District.

247 1668. *Fi. Fa. Returned & Filed 12th May,* '84.

State of Louisiana, 5th Dist. Court, Parish of Ouachita.

JOHN & CHARLES CHAFFE
vs.
J. T. LUDELING. } No. 1668.

The State of Louisiana to the sheriff of the parish of Ouachita, Greeting:

We command you that by seizure and sale of the north ½ of section 1, T. 17 north, of range 4 east, the property of John T. Ludeling, in the manner prescribed by law, you cause to be made the sum of five thousand dollars, with interest thereon from the third day of May, 1867, until paid, at the rate of eight per centum per annum, less the following credits:

Two thousand three hundred and twenty-seven and $\frac{93}{100}$ dollars, paid 3rd February, 1872; ninety-five and $\frac{10}{100}$ dollars, paid Dec'b'r 18th, 1876; nineteen hundred and thirty and $\frac{50}{100}$ dollars, paid Sept. 7th, 1879, and also the sum of one hundred and thirty-two dollars and ninety-five cents' cost & one dollar and ten cents, costs of issuing this writ, as well as your own costs and charges, to satisfy a judgment lately rendered against the said John T. Ludeling in our fifth district court for the parish of Ouachita in favor of said John and Charles Chaffe.

And how you shall have executed this writ you make re-
248 turn to our said court in seventy days, as the law directs.

Witness the honorable judge of the said court this 4th day of March, in the year of our Lord 1884.

AUSTIN GREEN, *Clerk.*

1668. *Costs on Fi. Fa.*

Jno. & Charles Chaffe *vs.* John T. Ludeling. To clerk's office, Dr.

1881.			
March 10.	Filing pet., 10; copy, 1.50; citation, 1.00	2	60
April 5th.	Default, 30; ans., 10; ans. & call filed, 10		50
July —.	Call allowed, 15; recusation, 25; oath, 25		65
" "	Order, 15; ex. filed, 10, & overruled, 30		55
Oct. 4.	Default, 40; 3 answers, 30		70
Nov. —.	Note evidence on ex., 50; 4 subpœnas, 1.40	1	90
" —.	Notice, copy, & ret., 50; 4 subpœnas, 1.40	1	90
Dec. 6.	Testimony taken before clerk	7	00
" —.	Serving 4 writs, 80; notice copy ret., 50	1	30
" 13.	Test'y of J. E. Hanna, 1.50; (16) fil'g int'g's, 10	1	60
" 16.	Copy int'g's, 75; notice, 1.00	1	75
" 23.	" " 75; com's, 1.00	1	75
Apr-l 19.	Set. cause, 10; 8 subpœnas & ret., 2.80	2	90
" —.	Minutes, 1.00; orders, 30; note evidence, 47.00	48	30
" —.	Serving writs, 50; judgment, 75	1	25
" —.	Recording, 7.50; appeal bond, 1.10	8	60
" —.	Filing & recording mandate		60
		83	85

Witness claim of M. F. Parker	7 60	
" " " C. H. Calhoun	7 00	
Curator's fees	25 00	
Cost d'y cl'k for copies	9 50	
		49 10
Cost of this writ		1 10
		134 05

249 *Sheriff's Return on Fi. Fa.*

Rec'd in office March 4th, 1884, and on the 7th of April, 1884, I executed this writ by seizing & taking into my possession, as the property of J. T. Ludeling, defendant, the following-described real estate, to wit: The north half of section one, in T. 17 N., R. 4 east; and, after all legal notices and delays, I proceed- to advertise the said property for sale, to wit, on the 12th day of April, A. D. 1884, by advertisement in the English language, announcing the sale to take place at the front door of the court-house, in the city of Monroe, parish of Ouachita, Louisiana, on Saturday, the 17th day of May, A. D. 1884, between the hours of 11 a. m. and 4 p. m. Said advertisement was inserted and published in the Ouachita Telegraph (a newspaper published in the city of Monroe, parish of Ouachita, Louisiana), to wit, from the 12th day of April, A. D. 1884, to the day of sale, being full 30 clear days from the date of the first notice given in said newspaper, and, on the 8th day of May, 1884, I was restrained from further proceedings by an injunction issued by the honorable 5th dist. court.

J. E. McGUIRE, *Sh'ff.*

250 2382. *Interrogatories to K. Lowe.*

5th Dist. Court, Parish of Ouachita, State of Louisiana.

JOHN T. LUDELING
vs.
JOHN & CHAS. CHAFFE. } 2382.

Interrogatories to be propounded to Walfley, clerk, & Loew, deputy clerk, of the district court of the United States at New Orleans, La., residents of the parish of Orleans, State of Louisiana, the answers to which are to be read in evidence on the trial of the case of John T. Ludeling *vs.* John & Charles Chaffe and sheriff, pending in the 5th district court of the parish of Ouachita, La., on behalf of the plaintiff, to wit:

1. Are you or not clerk or deputy clerk of the district court of the United States sitting at New Orleans?

Are you not the custodian of the records of the bankruptcy proceedings in Louisiana under the late bankrupt laws of the United States of America?

2. Did or did not Mrs. E. W. Warfield file a petition praying to

be declared a bankrupt? If so, state the date of the filing of said petition.

3. Annex a certified copy of a statement of the property surrendered by her, or Schedule B, and state the date when Mrs. E. W. Warfield was adjudged a bankrupt.

4. Did or did not John & Charles Chaffe prove up the
251 claim against Mrs. E. W. Warfield, in whole or in part?

5. Was there any order of the court to sell the property? If so, annex a certified copy of the order.

6. Was there any notice given of said order? If so, annex a certified copy of it. State how the notice was given, if any was given. If any returns on the order showing how the notice was served or given, annex a certified copy thereof hereto.

7. Was any sale of said property ever made under said order or not by the assignee? If so, did he ever render an account thereof to the court? Annex a certified copy thereof to your answer, with the date of its filing.

8. Did or not Mrs. Eliza W. Warfield ever receive her discharge in bankruptcy? Was or not any rule taken against her to show cause why her discharge should not be denied her? State if any action was ever taken on said rule; and, if not, why not. Annex copy of general order of the United States court made on the 17th of November, 1881, in regard to bankrupts.

JOHN T. LUDELING,
In Pro. Per.

A true copy.
Attest: AUSTIN GREEN, *Clerk.*

252 STATE OF LOUISIANA, }
City of New Orleans. }

Deposition of K. Lowe. Filed Nov. 1, '84.

Deposition- of witnesses taken before me, Jno. Devonshire, a commissioner of the circuit court of the U. S. for the eastern district of La., duly appointed and qualified and authorized by law to administer oaths and take the depositions of witnesses to be used on the trial of causes pending in the courts; said deposition- taken under the authority of the annexed commission issued out of the hon. 5th judicial district court, parish of Orleans, in a certain suit now pending therein between J. T. Ludeling, plaintiff, and J. & C. Chaffe & *al.*, defendants, as follows:

K. LOEW, being by me duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matters in controversy, deposes and says as follows:

1. To the first interrogatory he saith: I am now and since 1863 have been the deputy clerk of the district court of the U. S. for the eastern dist. of La. As such I am the custodian of the records of the court & familiar with the proceedings, whether bankruptcy, admiralty, or equity.

2. To the second interrogatory he said: Mrs. Eliza W.
253 Warfield filed her petition for adjudication of bankruptcy Sept. 11th, 1876.

3rd. To the 3rd interrogatory he saith: I annex copy of Schedule B, statement of property surrendered by Mrs. Warfield. She was adjudged bankrupt by Register Baker Sept. 11th, 1875.

4. To the 4th interr'y he saith: My docket, under date Oct. 30, 1876, showed following entry: "Creditors who proved debts." This paper is not found in the record. I, therefore, cannot say whether J. & C. Chaffe did prove up their claim before the register or not.

5th. To the 5th interr'y he saith: There was an order of the court to sell the property. I annex copy of same.

6th. To the 6th interr'y he saith: Notice was given of the order of sale. I annex a printed slip with clerk's certificate of proof of publication; also copy of service June 16th, 1877; sale postponed to the third Monday in November, 1877. The sale was further postponed from time to time. Exceptions taken, injunction issued, &, finally, on 15th April, 1879, the assignee filed another petition for sale, & Mr. Ray, attorney of Mrs. Warfield, withdrew her opposition to sale, & the assignee, Wm. T. Atkins, withdrew his opposition to the judgment & claim of J. & C. Chaffe. The withdrawal is filed same day, April 15, '79.

254 7th. To the 7th interr'y he saith: A sale was made by the assignee under this order of 15th April, '79. He rendered his account on the 15th Oct., '79. I annex copy.

8th. To the 8th interrog't'y he saith: Mrs. Warfield has never been discharged. A rule was taken against her on 17 Nov., '81, as well as a great many others, to show cause why a discharge should not be refused. No action had against her on the rule for want of service.

I annex copy of order of court.

The papers hereto attached form a part of my answers.

Further deponent saith not.

K. LOEW,
D'y Clerk U. S. Dist. Court, Eastern Dist. of Louisiana.

STATE OF LOUISIANA, }
City of New Orleans. }

The foregoing answers to interrogatories were reduced to writing by Mr. Loew, signed and sworn to by him as true and correct & responsive to the interrogatories, before me this day, 31st of October, 1884.

Witness my hand and seal, at the city of New Orleans, the day, month, & year first above written.

J. DEVONSHIRE,
U. S. Commissioner for Eastern District of La.

Charges for commission and copies, $15.00.

255 *Order of Sale Rendered April 15th, 1879, upon the Petition of the Assignee.*

No. 1549.

In Re ELIZA W. WARFIELD, Bankrupt.

The court having considered the application made by Wm. T. Atkins, assignee, and the evidence offered showing that the notice of this application has been made according to law & the order of this court, and that the property belonging to the bankrupt estate of Eliza W. Warfield, after deducting the Bon-air plantation, the title to which has been recognized to be in John & Charles Chaffe under the sheriff's sale made to them on the 16th September, A. D. 1886, is covered by mortgages exceeding its value, and that John & Charles Chaffe are the holders & owners of the oldest of said mortgages—

It is ordered, adjudged, and decreed that Wm. T. Atkins, assignee, sell said property comprising said bankrupt estate for cash, after advertisements once a week for three weeks in the newspaper known as the Telegraph, published at Monroe, parish of Ouachita, La.

That after paying the cost of sale, including $250, attorney's fees of said assignee, John Ray, the balance of the proceeds of sale be paid over to John & Charles Chaffe, to be applied, first, to
256 the payment of taxes due & which have been paid by said Chaffes; next, to the judgment & mortgages in their favor to satisfy the same, & any balance remaining to the next mortgage.

April 15th, 1879.

(Signed) EDWARD C. BILLINGS, *Judge.*

True copy of the original.

Clerk's office, U. S. dist. court, east. dist. of La., Oct. 30th, 1884.

K. LOEW, *D'y Clerk.*

Sale by Assignee.

STATE OF LOUISIANA, }
Parish of Ouachita. }

Be it remembered that Wm. T. Atkins, assignee, in the matter of Eliza W. Warfield, bankrupt, No. 1549, by virtue of an order of sale issued out of the dist. court of the U. S. of America for the district of Louisiana, did, in pursuance thereof, after reading the order of sale and the advertisement in the Ouachita Telegraph, the official journal of said parish and State, a clip from which is hereto annexed for reference, on said 7th day of June, 1879, at the door of the court-house, in the city of Monroe, in said parish of Ouachita, & offer for sale at public auction the following-described prop-
257 erty belonging to said bankrupt estate, when John & Charles Chaffe, represented herein by Charles Chaffe, became the purchasers thereof, theirs being the last and highest bid for the respective lots of property, to wit:

First. House and lot in Monroe, La., situated on Front street, bounded north by lot of Mrs. L. L. McGuire, east by Walnut street, south by Mrs. E. L. Strother's lot, and west by Front street & Ouachita river, having 206 feet front by 250 feet deep. Said John & Charles Chaffe bid the sum therefor of $1,500 (fifteen hundred dollars).

Second. Vacant lot in Monroe, La., on the northeast corner of Breard & Walnut streets, 60½ feet front by 165½ feet deep, for which said Chaffe bid the sum of $200 (two hundred dollars).

Third. Claim against the United States now pending before the Southern Claims Commission for horses, mules, cattle, & wagons taken by the United States forces in 1863 and 1865 from Monroe and the Bon-air plantation, in Ouachita parish; amount of claim, $3,331.66 (three thousand three hundred and thirty-one $\frac{66}{100}$ dollars), for which said Chaffe & Chaffe bid the sum of ten dollars.

Fourth. North ½ of sec. 3, township 17 north, range 4 east, containing 320 acres wood land, for which said Chaffe & Chaffe bid the sum of $160 (one hundred and sixty dollars).

258 Fifth. A part of sect. 21, township 18 north of range 4 east, north of Bayou de Siard & immediately north of same section owned by George Nelson, containing 64 $\frac{75}{100}$ acres wood land, for which said Chaffe & Chaffe bid the sum of $32 (thirty-two dollars).

Sixth. All that part of section 33 lying east of the prolongation of the west line of section 21, township 18, range 4 east, containing 65 acres, more or less, for which said Chaffe & Chaffe bid the sum of $32.50 (thirty-two $\frac{50}{100}$); theirs (the said John & Charles Chaffe, & aggregating in amount to the sum of $1,934.50), being the last bid, I adjudicated said above-described lots of property to said Chaffe & Chaffe.

Therefore be it known that, in pursuance of said order and by virtue of the authority vested in me, I, W. T. Atkins, assignee as aforesaid, for and in consideration hereinafter expressed, have adjudicated, bargained, sold, alienated, conveyed, and delivered, and by these presents do sell, bargain, transfer, convey, & deliver, unto John Chaffe & Charles Chaffe, residents of the city of New Orleans, represented herein by Charles Chaffe, who is here present & accepting this deed of sale for said firm of Chaffe & Chaffe, their heirs and assigns, for said above-described lots of property, as here-

259 inbefore described; to have and to hold unto them, their heirs & assigns forever, with all the rights & privileges of the former owner therein.

The price and consideration therefor being the sums therein enumerated and expressed, amounting to the sum total of one thousand nine hundred thirty-four and $\frac{50}{100}$ dollars, cash in hand paid, the receipt of which is hereby acknowledged & full discharge and acquittance given therefor.

The parties hereto dispense with the mortgage certificate required by article 3364 of the Civil Code of this State & exonerate me, recorder, from any liability in the premises.

Thus done, passed, & signed in the parish of Ouachita, in the presence of Charles H. Trousdale & Robert W. McClenden, Jr., witnesses

of lawful age and domicil, who hereunto sign their names, together with the parties thereto and before Robert W. McClenden, recorder of said parish, on this seventh day of June, A. D. 1879.

Interlineation of the words "at public auction," in 1st page, between 15th and 16th lines, made and approved before signing.

W. T. ATKINS, *Assignee.*
JOHN & CHARLES CHAFFE,
Per CHARLES CHAFFE.

Attest: CHAS. H. TROUSDALE.
R. W. McCLENDEN, Jr.

Recorded in Notarial Book X, pages 260, 261, 262, & 263, June 25, 1879.

R. W. McCLENDEN, Jr.,
Deputy Recorder

260 Bill of Ouachita for advertising sale, $14. Attached to assignee's account, dated June 2, 1879. Marked paid.
G. W. McCRANIE.

Assignee's Account. Filed with Act. of Sale, Vouchers, and Other Papers Oct. 15, 1879.

DR.

Estate of E. W. Warfield, bankrupt, in account with W. T. Atkins, assignee.

Vou.			
	1. To notice of app'l of assignee	$6	
	2. " " to creditors	15	
	3. " taking testimony in suit No. 11190, Atkins, assignee, *vs.* Chaffe	104	
	4. " am't p'd city taxes for 1878	25	
	5. " " State " " 1875 & '76	165	73
	6. Insurance on building	25	50
	7. Advertising sale	14	00
	8. Costs in suit 1446, Atkins, ass'n, *vs.* Strother *et al.*	10	00
	9. To am't due Richardson & Boatner, att'ys in suit 1446	50	00
	10. Rent of dwelling from 1st Oct., '76, to 7 June, '79, 32 mo. & 7 days, at $25.00 mo	806	25
	11. Care, custody, trouble in administering the estate for 32 mos. & 7 days, G. C. 130 & costs	480	00
	12. Comm. on sales, $1,000 at 5%	50	00
	" " 934.50, 2½	23	55
	Due J. & C. Chaffe under the decree	965	72
		$2,740	75

261 CREDIT.

By sale of property as per process verbal and deed hereto annexed marked "A."	1,934 50
By remission of rent by J. & C. Chaffe for 32 months & 7 days, at $25 per month. See their letter marked "B"	806 25
	2,740 75

Memorandum.

J. & C. Chaffee paid John Ray, att'y for assignee, the $25 allowed in the order of sale. See postscript to his letter marked "C."

True copy of original.

Oct. 31st, 1887.

[SEAL.] R. LOEW, *D'y Clerk.*

General Order in Bankruptcy.

Nov. 16, 1881.

In all cases in bankruptcy pending in this court wherein the bankrupt has not applied for a discharge, or having applied has failed to prosecute his application, a rule shall be entered, returnable on the 2nd Monday of January, A. D. 1882, at 11 a. m., requiring the bankrupt to show cause why a discharge should not be refused for want of seasonable application therefor, or having filed an application has failed to prosecute the same.

It is further ordered that in all cases where the bankrupt has been represented by an attorney of record the service of this order
262 shall be made upon him, and where he has not been represented by an attorney of record, upon the bankrupt.

It is further ordered that the matter of service of this order be committed to the register in charge of the respective cases in bankruptcy, & that for their execution of this order a proper fee will be taxed.

True copy.

Oct. 31st, 1884.

[SEAL.] K. LOEW, *D'y Cl'k.*

SCHEDULE "B." Form No. 1.

Statement of All Real and Personal Estate and Effects Whatever which are Now in the Possession, Enjoyment, or under the Control of the Petitioner, or which are Held by Any Other Person in Trust for His Use, or to the Possession or Enjoyment of which He is Entitled at the Date of Filing Petition.

Particular description of real estate owned by petitioner & held by him, & whether under contract or lease.	Encumbrances thereon, if any, & dates thereof.	Estimated value.
House & lot in Monroe, La., situated on Front street, bounded north by Mrs. L. L. McGuire, east by Walnut street, south by Mrs. E. L. Strother's lot, & west by Front street & Ouachita river—206 feet front by 250 feet deep.	Incumbered as stated in schedule "A" No. 2.	$3,000 00
Vacant lot in Monroe, La., on the northeast corner of Breard and Walnut Sts., 60½ feet front by 165½ feet deep.	------	300 00
That part of Bon-air plantation composed of section 21, T. 18 N., R. 4 E., or Felix Racine confirmation, & sec. 67, T. 18 N., R. 4 E., or Chas. Roberts' confirmation; west ½ of lot 2, south ½ of lot — and all of lot 3, in sec. 33, T. 18 N., R. 4 E., east of the prolongation of the west line of said sec. 21, T. 18 N., R. 4 E., to township line bounded on the north by Bayou de Siard, west by the west line of sec. 21 to township line, between 17 & 18, & south by tow'p line, between 17 & 18, & west by lands of Mrs. E. L. Strother—565.37 acres; in cultivation, 211 acres.	------	6,780 00
N. ½ of sec. 3, T. 17 N., R. 4 E.—320 acres in woods; a part of sect. 21, T. 18 N., R. 4 E., north of Bayou de Siard & immediately north of part of same.	------	960 00
Sec. owned by Geo. Nelson—64.75 acres in woods.	------	130 00

264 *Oath to Schedule "B."*

UNITED STATES OF AMERICA, *District Court of Louisiana,* } ss:

On this 1st day of Sept., A. D. 1876, before me personally came Eliza W. Warfield, the person mentioned in and who subscribed to the foregoing petition and schedule marked "B" respectfully, and who, being by me duly sworn (or affirmed), did declare the said schedule to be a statement of all his estate, both real & personal, in accordance with the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

ELIZA W. WARFIELD, *Petitioner.*

True copy of original.
Oct. 30th, 1884.
[SEAL.]

K. LOEW, *D'y Clerk.*
W. J. Q. BAKER,
Register in Bankruptcy.

265 *Petition to Bond & Release Property. Filed* 12 *Ap'l*, '84.

To the hon. judge of the 5th district court in and for the parish of Ouachita, State of Louisiana:

The petition of John T. Ludeling, a resident of the parish and State above mentioned, respectfully asks that an order may be granted in the case of John & Charles Chaffe *vs.* John T. Ludeling for the sheriff to release the property seized in said case under and in his hands on defendant giving bond conditioned according to law & for general relief, &c.

JOHN T. LUDELING.

Order.

Ordered that the defendant be permitted to give bond for the delivery of the property seized on day of sale upon executing bond conditioned according to law.

Done & signed this 12th April, 1884.

R. W. RICHARDSON,
Judge 5th Dist.

Bond Releasing Property. Filed 12*th Apr'l*, '84.

State of Louisiana, Parish of Ouachita, Fifth District Court.

JOHN & CHARLES CHAFFE
vs.
J. T. LUDELING. } # 1668.

Know all men by these present that we, John T. Ludeling, as principal, & Mrs. Ellie Morgan, wife of D. C. Morgan, as security (duly authorized & assisted by her husband), all residents of the
266 parish & State above mentioned, are legally and justly indebted unto John Chaffe & Charles Chaffe, plaintiffs in execution, *in solido*, in the sum of six thousand dollars, being more than one-half over & above the estimated value of the lands seized under the writs in this case, to the payment whereof they bind themselves & their legal representatives.

The condition of this bond or obligation is this:

Whereas on the 3rd of April an execution was issued in the above-entitled case & the north half of section one, T. 17, R. 4 east, was seized as the property of the defendant; & whereas the law gives defendant the right to retain the possession of the property seized in his own possession from the time of seizure until the day of sale, conditioned for the faithful delivery of the property seized at the time of sale: Now, therefore, if the defendant complies with the said condition this bond is to be null & void; otherwise it is to remain in full force & effect according to law.

Done & signed this 12th (twelfth) of April, 1884.

JNO. T. LUDELING.
ELLIE MORGAN.

I authorize my wife to sign the above bond.

D. C. MORGAN.

Approved.

J. E. McGUIRE, *Sheriff.*

267 *Deed.*

Weis to King.

Julius Weis with H. D. King. Act of agreement.

Be it known that on this fifth day of the month of January in the year of our Lord one thousand eight hundred and seventy-eight, before me, Theodore Guyol a notary public duly commissioned and sworn for the parish of Orleans, State of Louisiana and in the presence of the witnesses hereinafter undersigned, personally came and appeared, Julius Weis, a resident of this city, and Henry D. King of the parish of Monroe in this State, who severally declared that they made and entered into the following agreement, to wit: The said Julius Weis hereby agrees and binds himself to sell and convey for the consideration, and on the terms and consideration hereinafter expressed, unto the said H. D. King, who binds himself to purchase, a certain tract of land on which Daniel Y. Grayson deceased, last resided in Ouachita parish, in this State, being all of section two, the north half of southwest quarter, the northwest quarter of southeast quarter, and the southwest quarter of south quarter of section one. The north half of southeast quarter in section three, and the north half of section eleven in township seventeen north
268 range four east, and containing eleven hundred and $\frac{60}{100}$ acres more or less.

Also a tract of land located in the parish of Richland in this State, being a cotton plantation, and particularly described as follows: viz. The northeast quarter of northeast quarter of section thirty-four. The southeast quarter of the southeast quarter of section twenty-seven. The south half of section twenty-six; the south half of the northwest quarter; the south half of the northeast quarter of section (26) twenty-six. The north half of the southwest quarter and the south half of the northwest quarter of section twenty-five all in township No. sixteen north of range five east, containing five hundred and fifty-five acres more or less, on the west side of Bœuff river, and the north fractional half of section 35; the south fractional half of section twenty-six. The southwest fractional quarter of section twenty-five. The west half of northwest quarter and the west half of *of* the south quarter (fractional) of section thirty-six, all in township sixteen, north of range five east lying on both sides of Bœuff river and containing in the aggregate eleven hundred and thirty-five $\frac{64}{100}$ acres more or less; together with all the buildings and improvements on the said tracts of lands and together also with ten mules now on each of said two plantations and all the implements of

husbandry thereon. Which sale shall be made for and
269 in consideration of the price and sum of eighteen thousand, three hundred and seventy-three dollars and ninety-two cents, and interest payable as follows: the sum of three thousand three hundred and seventy-three dollars and ninety-two cents in ready money, which the said Weis acknowledges to have received, and the remainder in six several, promissory notes, for the sum of two thousand five hundred dollars each, all drawn and endorsed by the said H. D. King, dated on the third day of the present month, bearing interest at the rate of eight per cent. per annum from their date until paid, and made payable at the office of Meyer, Weis & Co., as follows: One in twelve months, one in fourteen months one in two years, one on the first day of March eighteen hundred and eighty, one in three years, and one on the first day of March eighteen hundred and eighty-one; which notes have been delivered to the said Weis, who acknowledges the — thereof, as well as of the said ready money. The vendor shall retain a special lien and mortgage on the said described property to secure the payment of the credit portion of said price. And upon the payment of the three notes above described first maturing, the said Weis shall exe-
270 cute a sale of said property free from encumbrances to the said H. D. King, retaining a vendor's lien and mortgage thereon to secure the payment of the portion of the price then unpaid. It being well agreed and understood that should the said King fail to pay any of the above-described three notes first maturing, the said Weis shall have the right to annul this agreement if he thinks proper, and declare the same null and void, and the said King shall in such case forfeit any payment made by him, with the understanding, however, that the said property shall be sold by the said Weis either by private or public sale, and that after payment of whatever balance may be due to him, in capital and interest on the above price, the surplus if any there be, shall be paid over to the said King.

Done and passed in my office in the presence of Ambrose G. La Brice and John Steiner, competent witnesses who have signed these presents, with the said parties and me, notary, after reading the whole.

(Original signed.)

JULIUS WEIS.
H. D. KING.

A. G. LA BICE,
JOHN STEINER.

A true copy from the original.
271 [SEAL.] THEO. GUYOL, *N. P.*

A true record this 6th March, 1879.

R. W. McCLENDON,
D'y Recorder.

A true copy this 8th day of June, A. D. 1888.
[SEAL.] WEBSTER A. MYATT,
D'y Recorder.

Deed. King to Rosenfield.

STATE OF LOUISIANA,
Parish of Ouachita.

King
to
Rosenfield.

Sale of Edward plants.

Be it remembered that on this the 13th day of November A D 1883 before me Isaiah Garrett d'y clerk in and for the said parish and *ex officio* a notary public, personally came and appeared Henry D King of said parish and Abe Rosenfield of Baton Rouge La, the latter being represented herein by Frank P. Stubbs, who appears as the agent and attorney-in-fact of said Rosenfield, and who engages to file with this act a written power of attorney from his said principal authorizing the action herein taken by his said agent. Whereupon the said parties declared and acknowledged that the
272 said Henry D. King for the consideration and on the terms and conditions hereinafter set forth, has sold, transferred, and delivered and does by these presents sell, transfer, set over and deliver unto the said Abe Rosenfield, his heirs and assigns forever, the following-described plantation, and improvements and appurtenances, situated in the parish of Ouachita to wit: That certain tract of land and plantation acquired by this vendor principally from Julius Weis of New Orleans formerly known as the Grayson place, more lately designated as the Edwards plantation and with additions made thereto by said H. D. King now composed of all section No two. The north half of southwest quarter, the northwest qr of the southeast qur the S. W $\frac{1}{4}$ of the S W $\frac{1}{4}$ of sec No one the N $\frac{1}{2}$ of S E $\frac{1}{4}$ sec No 3. The north half of section No eleven all in T 17 N R 4 east, also those parts of lots Nos 4 & 5 of section 35 and of the Baptiste Amilton back concession T. 18. N R 4 E. which lies below and south of the right of way of the V. S. & P. R. R. and including that portion of said concession which lies in T 17 north of R 4 east; also the south half of southeast qr and the southwest qr of section No (3) three in T 17 N R 4 east, containing in the aggregate fourteen hundred and forty-one acres more or less, together with all the buildings and improvements thereon and sixteen head of mules and four wagons and all the agricultural im-
plements &c attached to or belonging to said plantation, to
273 have & to hold the same in his own right to himself his heirs and assigns forever. The consideration of the foregoing sale and giving in payment is as follows:

1st. The said Abe Rosenfield represents himself as the *bona fide* owner of certain promissory notes executed by this vendor H. D. King on the 20th day of August 1881

One for $5,000.00 due 15th April 1882

One for $4,000.00 due 15th April 1883

One for $4,000.00 due 15th December 1883
One for $6,000.00 due 15th April 1884
One for $6,000.00 due 15th December 1884.

All payable to the order of, and in blank by said H. D. King, and all bearing interest at the rate of 8% per annum interest from date, which said notes were executed in settlement and liquidation of certain indebtedness due by said H. D. King to Alexander Shlenker & Co., and the payment thereof in principal and interest and attorneys' fees, were secured by a special mortgage of even date with said notes, upon the aforesaid property by public act passed before Joseph Cohn a notary public in and for the city of New Orleans.

2nd. The said property is also affected and mortgaged to secure the payment of a certain note and account interest thereon, executed by this vendor as a part of the purchase price of said property for the sum of twenty-five hundred dollars, dated January 3rd
274 1878 and bearing 8% interest per annum from date, which is now held by Lehman Abraham and Co. of New Orleans, and payment of which has been extended to 1st November 1884.

3rd. All the aforesaid notes executed by said King and delivered to Alexander Shlenker & Co., being held by Abe Rosenfield and no part of the principal or interest of those which are past due having been paid and said King acknowledging his inability to pay the note falling due 15th December 1883. The said Rosenfield accepts this sale, and giving in full discharge, payment, and satisfaction of the note for four thousand dollars due 15 December 1883. That for six (6) thousand dollars due 15th April 1884, and six thousand doll's, due 15th Dec. 1884, together with the accrued interest thereon and also the interest accrued and due on the notes maturing respectively on the 15th of April 1882 & 1883. The whole amounting at this date to $21,000.00 twenty-one thousand dollars, which said notes are here delivered to said King as paid & cancelled.

4th. In consideration of the assumption and obligation by said H. D. King to take up and pay on or before the first day of November 1884, the note held by Lehman Abraham & Co. for $2,500.00 and accrued interest which is secured by mortgage on the
275 property herein conveyed, anterior in date and registry to that held by said Rosenfield on the cancellation and release of said mortgage in so far as it affects the property herein sold on or before said date. The said Abe Rosenfield obligates himself to hold the said notes of H. D. King which are not absolutely extinguished by this transaction, and not to dispose of the same, and upon the payment on the said note held by Lehman Abraham & Co, or cancellation of the mortgage securing the same, such payment or cancellation to operate as a full discharge and payment of the two notes reserved by said Abe Rosenfield being more particularly described as one note $5000.00 due April 15th 1882, one for $4000.00 due April 15th 1883, and bearing 8% per annum interest from date as hereinafter described, it being the true intent of this act, that the giving in payment of the property hereinafter described and the payment by H D King of the prior mortgage thereon, as hereinbefore described or its cancellation and release within the time stated

shall be in full payment and extinction of the notes hereinafter described amounting to $25000.00 with all interest thereon, and the two notes now held by the said A. Rosenfield shall be delivered up, paid, and cancelled; but if said King shall fail to pay said
276 mortgage note held — Lehman Abraham & Co as hereinbefore described or shall fail to have the mortgage securing the same to be erased and cancelled so far as it effects the property herein sold and conveyed, then the two notes reserved by said A. Rosenfield shall continue as valid and exegible obligation of said H. D. King and this giving in payment shall be complete and for the consideration of the notes surrendered and cancelled and the accrued interest on all the said notes as hereinbefore stated.

5th. The said H D King obligates himself to pay all taxes, whether State or parish now assessed against or upon the property herein conveyed

6th. The said Abe Rosenfield grants to said King for a term of one year from Jany 1st 1884 to repurchase the property herein conveyed at the price of $21,000.00 one fourth to be cash the balance on three equal installments to be represented by notes drawing interest from date at 8% per annum and secured by special mortgages and vendors privilege with the usual clauses against alienator to pay attys fees in case of suit &c.

7th The said Abe Rosenfield acknowledges possession of the property sold and hereby leases the same to H. D. King for the year 1884, at a rent of $1500.00 to be paid on or before the 10th
277 of December the said King to pay in addition to said sum the taxes both State and parish, to keep the gin house and fixtures insured at his own expense for the benefit of A. Rosenfield and to keep the buildings, fences &c on the plantation in good repair

In case the said Rosenfield does not sell said property, the said King to have the refusal of its rent for the succeeding year, that is to say the year 1885;

H. D. King has executed his note for fifteen hundred dollars of this date payable to the order of Abe Rosenfield due 10th Dec. 1884 in liquidation of the amount herebefore agreed on as rent, the receipt of which F. P. Stubbs agent as aforesaid hereby acknowledges. The parties agree to dispense with the production of mortgage certificate required by law, and hold the notary harmless in the premises.

In faith whereof the said parties have hereunto affixed their signatures in presence of Charles J. Boatner and H. H. Russell competent witnesses and me said notary on this 13th day of November A. D. 1883.

H. D. KING
A. ROSENFIELD
By FRANK P. STUBBS
Agent & Att'y in Fact.
I. GARRETT, *D'y Clerk.*

Attest
H. H. RUSSELL
CHAS. J. BOATNER

A true record this 13th day of November, 1883.
[SEAL.] I. GARRETT, *D'y Clerk.*

278 A true copy this 9th day of June, A. D. 1888.
W. A. MYATT, *D'y Clerk.* [SEAL.]

Deed. Rosenfield to Stubbs.

STATE OF LOUISIANA,
Parish of East Baton Rouge.

Abe Rosenfield
to
Frank P. Stubbs.

Be it known that on this 14th day of January A. D. 1888, before me Richard J. Hummel, d'y clerk and recorder in and for said parish and State duly sworn, personally came, Abe Rosenfield to me well known as a resident of said parish and State that for and in consideration of the price of ten thousand dollars to be to him paid in the manner and at the dates named by Frank P. Stubbs of the parish of Ouachita, he has granted bargained sold, transferred and delivered and by this act does hereby grant, bargain, sell, & transfer and deliver to said Stubbs the following property in the parish of Ouachita in said State, to wit: A plantation known by the name of "Edwards" about five miles east of Monroe on the V. S. and P. R. R. composed of north half of southwest quarter, northwest quarter of southeast quarter and southwest quarter of southwest quarter of sec. one (145 acres) all of sect. two (607.40) acres south half of section three (305 acres) north half of section eleven
279 (320) acres all in township seventeen north of range (4) four east and all those parts of lots four and five in section thirty-five and of the Baptiste Ambleton back concession in township 18 N. of R. 4 E. which lie below or south of the V. S. & P. R. R.; as well as that part of back concession or grant lying in township seventeen N. of R. 4 east, all in the district of lands north of Red river and containing in the aggregate about fourteen hundred and forty acres more or less, together with the nine mules belonging to the place, being what is left of the stock bought with the place by this vendor from H. D. King on 15 November 1883, as per act passed before the clerk of Ouachita parish and recorded in his office, including in this transfer and sale, all the rights, privileges and immunities belonging to said plantation and property with the buildings and improvements thereunto attached or belonging. To have and to hold the same unto the said Stubbs, his heirs and assigns forever. The consideration of this said land is declared by both parties to be as stated ten thousand dollars, of which five thousand thereof is to be paid within thirty days from this date and the balance to wit: five thousand dollars is to be paid on the first day of January next, and for which the said Stubbs has executed
280 his two notes payable to the order of this vendor and both of even date herewith and each for the sum of five thousand

dollars, the first one and payable in thirty days with eight per cent. interest from first of January; next with same rate of interest after maturity, which said notes after having been by me paraphed, notary, were delivered duly to vendor who acknowledges receipt of same, and the said Frank P. Stubbs declared that to secure the prompt payment of the price as evedenced by said notes as well as all costs including attorney's fees in case of suit to compel payment, which are hereby fixed at five per cent., has mortgaged and hypothecated the *the* property hereby purchased to and in favor of the vendor of each & all holders of said obligations or either this to stand mortgaged until the final payment of the price, the said Stubbs promising hereby not to alienate, deteriorate or encumber the property to the prejudice of this act. Both parties declare that all taxes assessed against said property are fully paid and discharged and both declare that they dispense with the production of certificate of mortgages required by law and exonerate me notary from all responsibility in the premises.

281 Thus done & passed, in the presence of William Hubbs and Charles Bergeron, the date first above written.

(Sign'd) A. ROSENFIELD.
FRANK P. STUBBS.

WM. HUBBS.
CHAS. BERGERON.

[SEAL.] R. J. HUMMEL,
D'y Clerk & Recorder.

STATE OF LOUISIANA, }
Parish of East Baton Rouge. }

I hereby certify that the above and foregoing act is a true and correct copy of the original on file in this office and of record in Notarial Book No. 10, folio 101, as witness my hand and seal of office on this the fourteenth day of January, A. D. 1888.

[SEAL.] R. G. HUMMEL,
D'y Clerk & Recorder.

A true record. This 19th day of January, 1888.
R. A. YOUNG,
D'y Clerk, &c.

A true copy. This 9th day of June, A. D. 1888.
W. A. MYATT, *D'y Clerk.*

282 2382. *Pl'ff's Bill of Exceptions. Filed May* 14, '88.

5th District Court, Parish of Ouachita, La.

J. T. LUDELING }
vs.
J. & C. CHAFFE. }

Be it remembered that when this case was taken up for trial plaintiff moved to take for confessed the interrogatories to J. & C. Chaffe,

propounded on facts and articles, which was objected to on the grounds that such questions as had been ordered to be answered had been answered, which objections were sustained, & a bill of exceptions was taken to the ruling, which bill plaintiff now presents & attaches the interrogatories as part hereof, and prays that it may be signed.

Be it further remembered that on the trial of said case Charles J. Boatner, a witness in this case, *were* asked the following questions:

Who employed you in the case of J. & C. Chaffe *vs.* J. T. Ludeling?

Who employed you in the present suit?

Who paid your fee in the suit of J. & C. Chaffe?

Who is to pay your fee in the case?

To which defendant objected on the grounds that they were irrelevant, not pertinent to any issue in the case, & the objections were sustained & bills of exceptions were reserved, & plaintiffs present this bill of exceptions, which he prays may be signed.

WM. F. MILLSAPS,
Judge ad hoc.

283 *Appeal Bond. Filed 23d May, '88.*

The State of Louisiana, Parish of Ouachita, Fifth District Court.

JOHN T. LUDELING
versus
J. & C. CHAFFE. } No. 2382.

Know all men by these presents that we, John T. Ludeling, as principal, and F. B. Ludeling, as security, of the parish of Ouachita, are held and firmly bound unto Austin Green, clerk of the fifth district court in and for the said parish and State, and his successors in office in the sum of one hundred dollars, lawful money of the United States of America; for the payment whereof, well and truly to be made, we bind ourselves, our heirs, administrators, and assigns, & each of us *in solido*, firmly by these presents.

Dated and signed this 23d day of May, A. D. 1888.

The condition of the above obligation is such that whereas the above-bounden John T. Ludeling has applied for and obtained an order for a devolutive and suspensive appeal from a certain final judgment rendered against him in our said court on the 18th day of May, A. D. 1888, in the above entitled and numbered suit:

Now, therefore, if the said John T. Ludeling shall well and truly prosecute his said appeal with effect and shall satisfy whatever judgment may be rendered against him, or that the same
284 shall be satisfied out of the proceeds of the sale of his estate, real and personal, if he be cast in his said appeal, then this obligation to be null and void; otherwise to be and remain in full force and effect against principal & security.

JNO. T. LUDELING.
F. B. LUDELING.

Signed in the presence of and approved by—
AUSTIN GREEN, *Clerk D. C.*

Clerk's Certificate.

STATE OF LOUISIANA,
Parish of Ouachita.

I hereby certify that the foregoing 334 pages contain a true, correct, & complete transcript of all the pleadings and documents filed, all the evidence adduced, all the proceedings had, and of all the orders, decrees, and minutes of the court in the case number 2382 on the docket of the 5th district court for said parish, entitled John T. Ludeling *vs.* J. & C. Chaffe *et al.*

Given under my official signature and seal of office this 14th day of June, 1888.

[SEAL.] AUSTIN GREEN, *Clerk.*

285 Proceedings in the supreme court of the State of Louisiana, holding sessions at Monroe, La., June, 1888, term.

JOHN T. LUDELING *vs.* J. & C. CHAFFE *et al.* — No. 2382, Dist. Court. No. 1201, Sup. Court.

Filed, docketed, and numbered 1201 in the clerk's office of the supreme court of La. on the 14th day of June, 1888. John T. Ludeling in person, appellant; Stubbs & Russell, C. J. & J. S. Boatner, attorneys for def'ts, appellee-.

Monroe, La., Supreme Court.

JUNE 14TH, 1888.

The court met pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Robert B. Todd, Charles E. Fenner, Lynn B. Watkins, associate justices.

Minute: Submitted.

JOHN T. LUDELING *vs.* J. & C. J. CHAFFE. — #1201.

This case was called, taken up, and argued by Jno. T. Ludeling, Esq., for plaintiff, & by C. J. Boatner, Esq., for defendant. The case was then submitted on the pleadings & on briefs on file.

286 JUNE 15TH, 1888.

The court met pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Charles E. Fenner, Lynn B. Watkins, associate justices.

Minute: Decided.

JOHN T. LUDELING
vs.
J. & C. CHAFFE. } No. 1201.

Judgment affirmed.

JUNE 16TH, 1888.

The court met pursuant to adjournment.

Present: Their honors Edward Bermudez, chief justice; Charles E. Fenner, Lynn B. Watkins, associate justices.

Minute: Rehearing Refused.

JOHN T. LUDELING
vs.
JOHN & CHARLES CHAFFE. } No. 1201.

In this case the prayer for further time to elaborate the points set forth in support of the application for a rehearing has been duly considered, and were it deemed that anything more could be said in behalf of the party cast than was done in the oral and printed argument and in the briefs accompanying the petition it surely would have been allowed. We have given again full atten-
287 tion to the contention of the parties and to the criticisms to which the opinion delivered *have* been subjected, and consider that substantial justice has been done to the litigants in this case. The application for a rehearing is refused.

Motion to Amend. Filed 14th June, 1888.

Supreme Court of Louisiana.

JNO. T. LUDELING
vs.
J. & C. CHAFFE *et al.* } 1201.

To the honl. judges of said court:

Defendants respectfully move the court to amend the judgment of the lower court in the following particulars, to wit:

1st. By allowing the full amount demanded as damages, general and special, and for attorneys' fees, for the dissolution of the injunction issued herein, and rents of the property since the seizure.

2nd. By rendering such judgment against the surety on the bond given to obtain the injunction as may be rendered against plaintiff.

STUBBS & RUSSELL,
C. J. & J. S. BOATNER,
Attorneys.

288 *Opinion. Filed 15th June,* 1888.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.* } No. 1201.

Appeal from the district court for the parish of Ouachita.

[On margin :] (Signed) Ch. E. F., E. B., L. B. W.

This is an injunction suit to restrain the execution of judgment rendered against plaintiff & affirmed by this court in a certain suit entitled J. & C. Chaffe *vs.* Ludeling, reported p. 962 of 34 Annual Reports.

J. & C. Chaffe were recorded judgment creditors of Mrs. E. C. Warfield, and the suit just referred to was a hypothecary action brought against Ludeling as third possessor of certain property claimed to be subject to their judicial mortgage, and judgment was asked recognizing their mortgage on the said property and decreeing it to be sold in satisfaction thereof.

Defendant interposed a plea of discussion & other defenses, which were overruled for reasons given in the opinion, and judgment was rendered recognizing the mortgage and condemning Ludeling "either to pay the judgment, with the costs hereof, or to give up the land to be sold therefor."

This judgment was affirmed by this court.

289 It is too obvious to admit of serious discussion that this judgment absolutely & finally settled, as between the Chaffes & Ludeling, the right of the former to require Ludeling to pay off their mortgage debt or to sell the land for the satisfaction thereof. Ludeling has had his day in court on this issue and was bound to urge all his defenses, and his mouth is closed as to all matters antecedent to the judgment which he urged or might have urged against its rendition.

In his present petition for injunction he sets up a multitude of matters which were either pleaded or might have been pleaded as grounds for denying or qualifying the above absolute judgment, as to all of which the judge *a quo* sustained the plea of *res judicata*, & we consider his ruling to be clearly correct.

The plaintiff, however, assigns other grounds for his injunction arising subsequently to the judgment, which require consideration.

I.

He pleads that the judgment of Chaffes against Warfield, the record of which is the basis of their mortgage on his property, is peremepted and prescribed.

Unless it is prescribed there is no foundation for the plea
290 of peremption, the reinscription having been seasonably made.

The question of prescription depends upon the validity and effect

of the proceedings taken by the Chaffes to revive their judgment against Warfield.

The proceedings were taken in proper season, before the lapse of ten years from the rendition of the judgment. Art. 3547, C. C., provides: "All judgments for money shall be prescribed by the lapse of ten years from the rendition of such judgments; provided, however, that any party interested in any judgment may have same revived at any time before it is prescribed by having a citation issued according to law to the defendant or his representative from the court which rendered the judgment, unless defendant or his representative show good cause why the judgment should not be revived, and if such defendant be absent & not represented the court may appoint a *curator ad hoc* to represent him in the proceedings, upon which *curator ad hoc* the citation shall be served. Any judgment revived as above provided shall continue in full force from the date of the order of court reviving the same," &c.

291 The defendant, Mrs. Warfield, had removed from the State & died, and had no heirs resident in the State or property situated therein. Prior to her death she had made a surrender in bankruptcy, and her assignee in bankruptcy was still in office, having never been discharged.

In their petition for revival the Chaffes represented the death and bankruptcy of Mrs. Warfield & the non-residence of her heirs; alleged that W. T. Atkins had qualified as assignee of her estate & had never been discharged; set forth the non-residence of her heirs and prayed that "if they were in any sense her representatives" a *curator ad hoc* should be appointed to represent them; asked that the assignee & curator should be cited, and for judgment reviving the judgment. A curator was accordingly appointed. Atkins, the assignee, was duly cited and appeared & filed answer.

The curator accepted service of the petition & waived citation, but appeared & filed answer. On issue thus joined the court regularly tried the case and rendered a judgment of revival, which is now final. The plaintiff in injunction has never brought suit to annul this judgment. Even in his present action he has offered no prayer to have the judgment annulled nor has he brought in any

292 of the parties thereto except the present defendants. He simply treats it as an absolute nullity for want of citation.

It is indubitably true that a judgment rendered without citation is a nullity so absolute that it may be invoked in any proceeding & by any one interested.

But here, so far as the assignee is concerned, there was a perfect citation followed by appearance and answer. The petition advised the court of the grounds on which it was claimed that such assignee was the proper representative of the judgment debtor contradictorily with whom the proceedings in revival should be carried on. It may be assumed that the court in rendering its judgment considered & determined that he was the proper representative of the judgment debtor.

The question as to his capacity to represent the bankrupt debtor

in such proceeding is, under the jurisprudence of this court, to say the least, a doubtful one.

In the case of Alter *vs.* Nelson, 27 Ann., 242, which was a suit to revive a judgment against a bankrupt, it was held that citation of the latter was unavailing and certainly suggested as the only alternative that the assignee was the proper party.

293 In Wheless *vs.* Fisk, 28 Ann., 731, where bankruptcy occurred pending a suspensive appeal, it was held that the plaintiff had a right to proceed in order to preserve his right against the surety on the appeal bond, and the court of its own motion ordered the assignee to be made a party and render judgment contradictorily with him. Serra *vs.* Hoffman, 29 Ann., 17, was precisely similar to the last, and it was held that the assignee could not be made a party.

Chapman *vs.* Nelson, 31st Ann., 341, certainly says that the assignee is not a necessary or proper party in a proceeding to revive a judgment against a bankrupt, but the dicta on that point were *obiter*, because the case went off on the question of jurisdiction of the court.

In the case of Grayson'- Ex'or *vs.* Norton, later than the foregoing, the proceeding was to revive a judgment against a bankrupt by citation of the assignee alone. It was first held that it could not be done, but on rehearing, on the ground of *stare decisis*, it was held that the proceeding was proper and valid.

Manning's Unrept. Cases, p. 187.

294 In the case of Grayson's Ex'ors *vs.* Norton, 33 Ann., 1018, we quoted at length from the last-mentioned decision and indicated our approval of it where the assignee was still in office, but held it could not apply when the assignee had been discharged.

Finally, in a very recent case, which was also an action to revive, we said on the foregoing authorities: "We think the assignee was properly made a party to the action and the only one that could represent the bankrupt debtor or his estate."

Stackhouse *vs.* Zuntz, 36 Ann., 529.

If there be error in these decisions, it is one which originated long ago, and which has been perpetuated on the ground of *stare decisis*, to protect parties who have acted upon this jurisprudence as a means of saving their judgments from destruction by prescription. The question involves nothing but a method of proceeding in order to interrupt prescription, which is subject to the arbitrary control of the legislature, and no class of cases invokes so strongly the application of *stare decisis*.

In a proper case we might review them and might consider the distinction between bankrupts who have secured their discharge and those who have not, though the bankrupt who does not

295 plead his discharge is just as amenable to suit as if undischarged, and in several of the cases the bankrupt had not been cited at all.

At all events and without finally committing ourselves on all

these questions it is obvious that the judgment of revival here invoked is not infected with any nullity so absolute as to authorize it to be questioned by a third person in this collateral way, but that its validity depends on a grave question of proceeding, the propriety of which seems to be sanctioned by the judgment itself. This obviates the necessity of considering the validity of the proceeding as against the curator under his waiver of citation.

The defense of prescription was therefore properly overruled.

II.

The objections as to the form of the execution and the failure of the sheriff to advertise the sale in the paper, suggested by the defendant in execution, have been elaborately considered by the judge *a quo*, and we consider his reasons for disregarding them sufficient.

296 The defendants in this case are not responsible for the sheriff's default in the matter of the advertisement, and it may be corrected in the future proceeding, which will be necessary. Had it been the sole ground of the injunction it would doubtless have been corrected as soon as suggested.

III.

Plaintiffs claim credit for the enhanced value of the property arising from the improvements made, not only by himself, but by his immediate vendor, the succession of Dinkgrave, his warrantor. He has already recovered judgment against his warrantor for the full price paid by him, which naturally includes the value of the improvements made at the date of the sale. He certainly cannot claim the value of Dinkgrave's improvements out of the sale and at the same time hold a personal judgment against his succession for the same value. He may subject this value to his uncollected judgment against Dinkgrave, but he cannot directly claim it.

297 The whole of this claim should have been asserted against the proceeds of sale and had no place in this injunction suit, but the judge *a quo* recognized plaintiffs' claim to the value of his own improvements, and as no amendment is asked in that respect it must stand.

Defendants' prayer for an amendment allowing them a judgment for rents & revenues has no foundation in the pleadings and cannot be allowed in this proceeding, nor do we think it proper to amend the judgment as to damages.

Judgment affirmed.

Application for Rehearing. Filed June 16th, 1888.

Supreme Court of Louisiana.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.*

The plaintiff & appellant respectfully petitions this honorable court for a rehearing in this case on the following grounds, to wit:

1. The court erred in supposing that it was necessary for defendant to bring an action to annul the judgment in J. & C. Chaffe *vs.* E. W. Warfield prior to the seizure of his property. He is no party to that suit, & had no right to interfere in it until his property was seized to satisfy said judgment.

2. The court is also in error in supposing that it was essential that plaintiff, in injunction, should have prayed for the an-
298 nulment of that judgment. He alleged that the judgment of revival of J. & C. Chaffe *vs.* E. W. Warfield had no validity or legal effect; he charges that said judgment was obtained irregularly by collusion between those pretending to represent Mrs. Warfield's estate & the assignee and the plaintiffs, & that Mrs. Warfield has not been legally cited, * * & that the judgment and mortgage are prescribed. He prays for an injunction on these grounds among others, & he prays that the plaintiffs, J. & C. Chaffe, & the sheriff be cited; that Austin Green, appointed adm'r, be cited & his appointment be declared null & void, & that the injunction be made perpetual for the foregoing reasons. The only party to the suit to revive not cited who has an interest was Mrs. Warfield, the judgment debtor. She was not made a party because it was impossible so to do, as she was an absentee, who had then died out of the State, & there was no property of hers in the State; Cobb, the *curator ad hoc*, had moved out of the State & had no property in it, & Atkins had died the day after the judgment was signed, so that it was not possible to cite them legally; but, unless she or her legal representative was a party to that suit by being cited, the judgment was an absolute nullity. A suit to annul it was unnecessary.
299 This your honors admit, but your honors say "so far as the assignee is concerned there was a perfect citation followed by appearance & answer. * * *" It may be assumed that the court * * "considered and determined that he was the proper representative of the judgment debtor," and after a very cursory review of the cases cited on the question as to whether the assignee is the representative of the judgment debtor referred to in the act of 1853 reenacted, in the code, your honors say: "At all events, and without finally committing ourselves on all the questions, it is obvious that the judgment of revival here invoked is not infected with any nullity so absolute as to authorize it to be questioned by a third person in a collateral way, but that its validity depends upon a grave question of proceeding the propriety of which seems to be sustained by the judgment itself." With all respect for this court it is submitted that this is arguing in a circle. The question to be decided is assumed—a "*petitio principie.*"

If the assignee was the legal representive of Mrs. Warfield, the judgment debtor, then Mrs. Warfield was cited; but it is denied that he was her representative in the sense of the act of 1853. Sup-
300 pose any other third person has been cited & had answered would the judgment thus rendered be binding? The fact that that law was enacted when there existed no bankrupt law creating assignees would seem to be conclusive that the assignee was not the representative of the judgment debtor referred to by that

act; & the reasoning of this court in Serra *vs.* Hoffman & Chapman *vs.* Nelson is unanswerable. Your honors say the case of Chapman *vs.* Nelso- went off on a question of jurisdiction, but the question whether the assignee represented the discharged bankrupt & could be cited as his representative in an action of revival was expressly made & argued, & the court considered it maturely & reaffirmed what the court had said in Hugo *vs.* Hoffman two years before. The Dred Scott case went off on a question of jurisdiction, yet the Supreme Court passed upon all those important issues which were presented in the case & its authority has not been questioned, at least in this State. On the other hand, the question was not made in the case of Stackhouse *vs.* Zuntz, the assignee who was in possession of the undivided half of the plantation specially mortgaged with the other debtor *in solido*, merely interposed the discharge of the bankrupt, whose property was in his control. In the Grayson case
301 the court clearly indicated its non-approval of what was said had been decided, but which in fact had not been decided.

It is submitted with respect that your honors are in error when you say that you "indicated our approval of it when the assignee was still in office, but could not apply where the assignee had been discharged." This is what your honors said in the Grayson case, 33 Ann., 1020: "We held that in this suit the citation should have been issued to & served upon the judgment debtor or his legal representative, reversed the decree of revival & dismissed plaintiff's demand. We are now told by his counsel 'in instituting these proceedings we carefully followed, as the evidence of what the law was, a rule established & twice sanctioned by your predecessors.' This is true, &, as members of the bar, we understand the important necessity of not departing from a rule of practice which, however questionable it may be, has for several years been a guide to litigants. 25 Ann., 556; 27 An., 242. * * * Whatever may be views which we entertain as to this matter, plaintiff has properly invoked the rule *stare decisis*, & as, in this instance, no inter-
302 est can be effected by its application, we adhere to it." The decisions on which the court relied, 25 Ann., 556, & 27 An., 242, do not, in our opinion, apply to this case.

I again reiterate that the only question discussed or involved in the 25 An. case & in the 27 An. case was whether or not the discharged bankrupt could be cited in an action to revive, & that the organ of the court in the Grayson case relied too implicitly upon what co-nsel represented had been decided in these cases, & was led into error.

And the cases in 28 An. & 31 An., where the contrary doctrine was distinctly and correctly taught, *was* ignored and overlooked.

This is one of these unfortunate "ill-considered country cases" which courts and lawyers consider of but little authority. It is respectfully asked that this question be reconsidered in the present case. It is of vital importance to the rights of litigants in this case, & their rights ought not to be sacrificed because of a misconstruction of what had been previously decided. The Stackhouse *vs.*

Zuntz case was decided on the authority of the blunder in the Grayson case.

It is submitted that whatever the judge who rendered the judgment of revival may have considered, if Atkins was not the
303 legal representative of Mrs. Warfield, the judgment was rendered against her without having been cited, & is "a nullity so absolute that it may be invoked in any proceeding & by any one interested," & that the property of petitioner is being taken without due process of law "& in violation of the Constitution of the United States so absolute that it may be invoked in any proceeding & by any one interested."

It is submitted that the case of Wheless & Pratt *vs.* Fisk simply decided that when "a State court has obtained lawful jurisdiction of the parties & the subject-matter, that jurisdiction continues as long as the amount due is in dispute & remains unascertained." Bump, p. 145. I have not time to discuss the question now, but believe that a full and careful examination of the decisions of this State & of other States & of the Federal courts will show that the assignee is not the representative of the discharged bankrupt nor of the bankrupt not discharged.

3. If the assignee be the representative of the bankrupt debtor, then under the bankrupt act he could not have been sued or cited after the lapse of two years from the date of his appointment. Section 5057, p. 550, of Bump's Law and Practice in Bankruptcy.
304 "No suit, either at law or in equity, shall be maintainable in any court between the assignee in bankruptcy & a person claiming an adverse interest or right touching any property or rights transferable to or vested in such assignee unless brought within two years from the time when the cause of action occurred for or against him," &c.

"It is entirely within the power of Congress to establish a uniform system of bankruptcy on the subject of actions, whether by or against the assignee in bankruptcy, & such rule must of necessity supercede all State legislation on the subject. * * * This is to apply by the express words of the section to actions brought 'in any court whatever;' therefore in any court, State or Federal. Peissen *vs.* Harmer, 5 B. R., 252; S. C., 8 Phila., 100." This law is not only a statute of limitation, but it is a prohibitory law, & whatever is done in contravention to it is null.

This statute has been pleaded in bar to the action against the assignee in this case in the assignment of errors filed in this case, but it has not been noticed in the opinion of the court. It is submitted that the statute of limitation forbidding suits against assignees after two years, &c., should be maintained, & the suit of Chaffe *vs.*
305 Warfield be held to have been barred by it & should have been dismissed.

4. Plaintiff further alleges that there is error in the opinion rendered in this case in holding that the assignee was the representative of Mrs. Warfield & was as such properly cited in the suit of J. & C. Chaffe *vs.* Mrs. Warfield to revive the judgment sought to be enforced against appellant's property & thereby divested him of a

vested right acquired by purchase & the prescription of said judgment heretofore pleaded.

He avers that the citation served on Atkins, assignee of Mrs. Warfield, after she had moved out of the State & after her death could not be effectual against her or her representatives, heirs living in Tennessee & Missouri, & was not "due process of law," & if either the act of Congress aforesaid or the act of 1853 of Louisiana (re-enacted as article 3547 of the Civil Code) provides such mode or constructive service such act of Congress is in contravention of the 5th amendment of the Constitution of the United States & is null and void, & such act of the State of Louisiana is in violation of the first section of the 14th amendment of the — United States & is null and void.

306 Petitioner avers that these constitutional questions were raised in the assignment filed in this case & called to the attention of the court in oral argument, but no notice of them has been taken by the court.

5th. The petitioner avers that it is an error to mulct him in damages for suing out an injunction against the execution of a prescribed judgment under the condition of the jurisprudence of this State on the question who is the proper party to cite to revive a judgment against a bankrupt not discharged. There is certainly no rule of *stare decisis* to be found in any of the cases cited by defendants in this case on that question, & the reasoning in the cases in 28 An. & 31 An. will apply to this case as well as the law in bankruptcy & decisions cited from Bump in brief for plaintiff filed on argument of this case.

Wherefore petitioner prays for a rehearing on the points above stated, & for general relief, &c.

JNO. T. LUDELING.

307 *Assignment of Errors. Filed June 14th, '88.*

Supreme Court of Louisiana.

JOHN T. LUDELING *vs.* J. & C. CHAFFE *et al.* } Assignment of Errors.

The plaintiff and appellant, without waiving any of the grounds for the injunction alleged in his petition, respectfully avers that the judge *ad hoc* who decided this case misconstrued the act of Congress of 2nd March, 1867, & its amendments relative to bankruptcy in holding that the *the* assignee was the legal representative of the brankrupt, E. W. Warfield, & was as such properly cited in the suit of J. & C. Chaffe *vs.* E. W. Warfield to revive the personal judgment sought to be enforced against appellant's property & thereby deprive him of a vested right to his property acquired by purchase & the prescription of said judgment heretofore pleaded in violation of the 5th amendment of the Constitution of the United States.

He avers that the citation served on Atkins, assignee of E. W.

Warfield, after she had moved out of this State & after her death could not be effectual against her or her representatives, heirs living in Tennessee & Missouri, and was not "due process of law," and if either the act of Congress aforesaid or the act of 1853 of
308 Louisiana (re-enacted as act 3547 of the Civil Code) provides such mode or constructive service to bring the absent & dead judgment debtor & defendant into court (which is denied) said act of Congress & State law are in contravention to the first section of the 14th amendment & the 5th amendment of the Constitution of the United States & are null and void.

If the judge *ad hoc* be correct in his construction of the act of Congress aforesaid in deciding that the assignee was the representative of Mrs. Warfield upon whom citation should be served in the suit of J. & C. Chaffe *vs.* E. W. Warfield, which had no relation to any part of the "estate" or property of the bankrupt assigned to him, then he avers that under the bankrupt act of 1867 no suit could be brought or maintained against the assignee "unless brought within two years from the time when the cause of action accrued for or against the assignee."

This is not merely a statute of limitation, but is a prohibition against such suit after the expiration of said time. He pleads said statute in bar of the right to cite the assignee in said suit to revive.

J. & C. Chaffe's judgment against Mrs. Warfield is dated in March, 1874.

Atkins was appointed assignee in 1876. The suit to revive the judgment was filed 9th February, 1884. He prays that the
309 judgment appealed from be reversed, & that the injunction be perpetuated, with damages & costs, as prayed for in his petition & amended petition.

JNO. T. LUDELING.

Application for Time to Elaborate Argument. Filed 16th June, 1888.

Supreme Court, State of Louisiana.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et als.*

The plaintiffs in this suit, under rule IX, section one, of the rules of this court, published in 36 An., respectfully asks for additional time for elaborating the argument on the points made in the petition for a rehearing this day filed & for searching for authorities thereon.

He represents that the case was tried & decided on 18 May, 1888. The transcript was filed as soon as the clerk could have it ready, to wit, on 14 June, 1888, & was argued that day; that in the case of Meyer *vs.* Ludeling, tried at about same time as above case & filed in this court on the 14th June, 1888, and argued and submitted on same day, that petitioner was busily occupied in both these cases, important to him, besides being engaged in other cases at same time

in this court & the court of appeals, & that he has not been
310 able to give that time, study, & attention to this case in its preparation for argument, & especially on the application for a rehearing, which the case merits; that he has waived two of the three judicial days allowed him by law to facilitate the business of the court, &c., but now finds he has not the time necessary to present such authorities & arguments as he would like to present to this court; wherefore he respectfully asks for additional time for the purposes aforesaid.

JNO. T. LUDELING.

311 *Petition for Writ of Error. Filed June 25th*, 1888.

To the Honorable Edward Bermudez, chief justice of the supreme court of the State of Louisiana:

And now comes John T. Ludeling, of Ouachita, State of Louisiana, *in propria perso*unce, & complains that in the record of proceedings & also in the rendition of a judgment in a suit between John T. Ludeling, plaintiff, & John & Charles Chaffe *et als.*, to wit, J. E. McGuire, sheriff, & Austin Green, clerk & adm'r, defendants, in the supreme court of the State of Louisiana, being the highest court of law and equity of said State of Louisiana, in which a final judgment & decree was rendered against him on the 15th of June, 1888, in said court, wherein is drawn in question the validity of a statute of or authority exercised under the State of Louisiana, to wit, the act of 1853, re-enacted in the Revised Civil Code as article 3547, on the ground that said statute as construed by said court is repugnant to section one of the 14th amendment of the Constitution of the United States & the decision is in favor of its validity.

He avers that under their construction of said act of the General Assembly of Louisiana the court held that the assignee of Mrs.
312 E. W. Warfield, a bankrupt not discharged, who did not own any property in Louisiana, & a resident of the State of Tennessee for several years before her death in that State, & about four years after the assignee had sold all the property of the bankrupt, under a decree of the bankrupt court, and had distributed the proceeds thereof in accordance with said decree, & had filed his final account in said court, which has not been approved, might be legally cited to bring Mrs. Warfield, said bankrupt, into court in a suit to revive a judgment for money against her.

He avers that the service of citation on Atkins, assignee, to bring Mrs. E. E. Warfield or her heirs into court in a personal action was a substituted or constructive service & was not "due process of law," and the same is true of said act of 1853 if service of citation had been made on R. G. Cobb, *curator ad hoc*, or A. Green, clerk of the district court, as administrator.

He avers that he claimed a title, right, privilege, & immunity under the Constitution of the United States, fifth amendment, not to be deprived of his property without "due process of law," & the decision of the court was against such title, right, privilege, & im-

munity specially set up & claimed by the plaintiff. He
313 further avers that the bankrupt act of Congress of 2d March, 1867, was misconstrued by the court, which held that the service of citation on Atkins, assignee of the bankrupt, was effectual to bring Mrs. E. W. Warfield, the bankrupt, into court in a suit to revive a personal judgment against her under the circumstances above stated, the judgment which is sought to be enforced against plaintiffs' property acquired by him long before the bankruptcy of Mrs. Warfield, which construction would make said act unconstitutional, null, & void, because it would be in contravention of the fifth amendment of the Constitution of the United States, which forbids any one from being deprived of life, liberty, or property without due process of law.

Petitioner further avers that he interposed the limitation established by said bankrupt act of 2nd March, 1867, in bar of said suit against the assignee or the citation of the assignee after two years from his appointment, & the decision was against the title, right, privilege, or immunity specially set up & claimed by petitioner under said statute, all which appears in the record of the proceedings in said suit, manifest error hath happened, to the great damage of said John T. Ludeling.

314 Wherefore he prays for the allowance of a writ of error & such other process as may cause the same to be corrected by the Supreme Court of the United States.

JNO. T. LUDELING,
Att'y & Counselor.

Allowed on bond for five hundred dollars, with surety as required by law.

N. O., June 21st, 1888.

E. BERMUDEZ,
Chief Justice.

Supreme Court of Louisiana.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et al.* } No. 1201.

In this case the court has passed upon no question except the method of interrupting prescription on a judgment provided by the statute of the State, a matter within the arbitrary control of the State legislature and involving no question of due process of law. Even as to this question we have simply held that the judgment of revival could not be questioned in the present form of action.

I do not consider that any Federal question properly arises & was passed upon in the case; but as one was presented which, it is claimed, might be considered to exist by the U. S. Supreme Court I grant the order.

E. BERMUDEZ,
Chief Justice.

June 21st, 1888.

315 *Bond for Writ of Error. Filed June 25th*, 1888.

Supreme Court of United States.

JOHN T. LUDELING
vs.
J. & C. CHAFFE *et als.* } No. 2382.

Know all men by these presents that we, John T. Ludeling, as principal, & F. B. Ludeling, as security, are held and firmly bound unto John Chaffe, Charles Chaffe, J. E. McGuire, sheriff, & Austin Green, clerk of district court of Ouachita, adm'r, in the sum of five hundred dollars, to be paid to the said J. & C. Chaffe *et als.*, obligees above named, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves & each of us, jointly and severally, & our and each of our heirs, executors, or administrators, firmly by these presents.

Sealed with our seal-. Dated this 19th day of June, 1888.

Whereas the above-named John T. Ludeling hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Louisiana:

Now, therefore, the condition of this obligation is such that if the above-named John T. Ludeling shall prosecute his said writ of error to effect & answer all costs & damages if he shall
316 fail to make good his plea, then the obligation shall be void; otherwise to be & remain in full force & effect.

F. B. LUDELING.

Sealed & delivered in the presence of witnesses:
HENRY KLINE.
G. C. McDOWELL.

Approved.
E. BERMUDEZ,
Chief Justice.

Supreme Court of La.

STATE OF LOUISIANA, }
Parish of Ouachita. }

Personally appeared Francis B. Ludeling, who, being duly sworn, deposes and says he is the surety in the within bond; that he resides in the city of Monroe, parish of Ouachita, State of Louisiana, & is worth the full sum of one thousand dollars over and above his debts & liabilities & property exempt from execution.

F. B. LUDELING.

Sworn to and subscribed before me this 19th day of June, 1888.
J. B. BEATTIE,
D'y Clerk U. S. Circuit Court, Western Dist. La.

317 *Writ of Error. Copy. Filed 25th June*, 1888.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the supreme court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Louisiana, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John T. Ludeling, plaintiff, & John and Charles Chaffe & and J. E. McGuire, sheriff, & Austin Green, clerk of dis't court, adm'r, defendants, wherein was drawn in question the validity of a statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercises under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Con-
318 stitution or of a statute of the United States against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said John T. Ludeling, as by his complaint appears,

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, associate & acting Chief Justice of the said Supreme Court, the twenty-first day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

J. W. WHEATON,

319 *Clerk of the Circuit Court of the United States for the 5th Circuit & Western District of Louisiana.*

Allowed by—

——— ———.

A true copy.

Attest:

[SEAL.] J. B. BEATTIE, *D'y Clk.*

To Jno. & Chas Chaffe. Citation. Filed 25th June, 1888.

THE UNITED STATES OF AMERICA:

Supreme Court of the United States.

The President of the United States to John & Charles Chaffe, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein John T. Ludeling is plaintiff & you & others, to wit, J. E. McGuire, sheriff, & Austin Green, clerk, adm'r, are defendants in error, to show cause, if any there be, why the judgment rendered against the said John T. Ludeling, plaintiff, as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, associate justice
320 of the Supreme Court of the United States, this 21st day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

[SEAL.] E. BERMUDEZ,
Chief Justice Supreme Court of La.

Return on Citation to J. & C. Chaffe.

On the 27th day of June, in the year of our Lord 1888, personally appeared before me, the undersigned, P. B. Weaks, d'y U. S. marshal, who makes oath that he delivered a true copy of the within citation to F. P. Stubbs, of the firm of Stubbs & Russell, attorneys for the defendant, at his office, in the city of Monroe, La., at 10 o'clock and 45 minutes a. m., June 27th, 1888, having the original, of which this is a true copy, in my hands at the time.

P. B. WEAKS,
[SEAL.] *D'y U. S. Marshal, West. Dist. of La.*

Sworn to and subscribed before me this the 27 day of June, A. D. 1888.

[SEAL.] J. B. BEATTIE, *D'y Cl'k.*

321 *Citation to Austin Green. Filed 25 June,* 1888.

THE UNITED STATES OF AMERICA:

Supreme Court of the United States.

The President of the United States to Austin Green, clerk dist. court, adm'r, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Wash-

ington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein John T. Ludeling is plaintiff & you and others, to wit, John & Charles Chaffe & J. E. McGuire, sheriff, are defendants in error, to show cause, if any there be, why the judgment rendered against the said John T. Ludeling, plaintiff, as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this 21st day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

E. BERMUDEZ,

[SEAL.] *Chief Justice Supreme Court of Lousiana.*

Return on Citation to Austin Green.

On the 27th day of June, in the year of our Lord 1888, personally appeared before me, the undersigned, P. B. Weaks, d'y
322 U. S. marshal, who makes oath that he delivered a true copy of the within citation to F. P. Stubbs, of the firm of Stubbs & Russell, attorneys for the defendants, at his office, in the city of Monroe, La., at 10 o'clock and 45 minutes a. m., June 27th, 1888, having the original, of which this is a true copy, in my hands at the time.

P. B. WEAKS.

D'y Marshal, West Dist. of La. [SEAL.]

Sworn to & subscribed before me this the 27th day of June, A. D. 1888.

[SEAL.] J. B. BEATTIE, *D'y Clerk.*

Citation to J. E. McGuire, Sheriff. Filed 25th June, 1888.

UNITED STATES OF AMERICA:

Supreme Court of the United States.

The President of the United States to J. E. McGuire, sheriff, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein John T. Ludeling is plaintiff & you and others, to wit, John & Charles Chaffe & Austin Green, clerk &
323 adm'r, are defendants in error, to show cause, if any there be, why the judgment rendered against John T. Ludeling, plaintiff, as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this 21st day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

E. BERMUDEZ,

[SEAL.] *Chief Justice Supreme Court of La.*

Return on Citation to J. E. McGuire, Sheriff. Filed June 25th, 1888.

On the 27th day of June, in the year of our Lord 1888, personally appeared before me, the undersigned, P. B. Weaks, d'y U. S. marshal, who makes oath that he delivered a true copy of the within citation to F. P. Stubbs, of the firm of Stubbs & Russell, attorneys for the defendants, at his office, in the city of Monroe, La., at 10 o'clock & 45 minutes a. m., June 27th, 1888, having the original, of which this is a true copy, in my hands at the time.

P. B. WEAKS,
D'y Marshal, West Dist. of La.

Sworn to and subscribed before me this the 27th day of June, A. D. 1888.

[SEAL.] J. B. BEATTIE, *D'y Clerk.*

324 I, Robert J. Willson, clerk of the supreme court of the State of Louisiana, holding sessions at Monroe, La., do hereby certify that the foregoing 323 pages contain a true, correct, accurate, & complete copy of the transcript or record brought up on appeal to this the said supreme court at its June, 1888, term, at Monroe, La., from the 5th judicial district court in and for the parish of Ouachita, State of Louisiana, in the case entitled John T. Ludeling *vs.* J. & C. Chaffe *et al.* and numbered on the docket of the said supreme court 1201, together with a true, correct, accurate, and complete copy of all orders, decrees, minutes, writs, bonds, petition, opinions rendered, & all proceedings had in said case in the said supreme court of the State of Louisiana at the June, 1888, term of said supreme court, at Monroe, La.

Seal Supreme Court of the State of Louisiana.

In testimony whereof I hereunto set my official signature and affix the seal of said supreme court, at the city of Monroe, La., on this the 10th day of September, A. D. 1888.

ROB. J. WILLSON,
Clerk Sup. Court, at Monroe, La.

325 Supreme Court of the United States.

JOHN T. LUDELING, Pl'ff in Error,
vs.
J. & C. CHAFFE *et als.*, Def'ts in Error.

Assignment of Errors.

1. In 1884 J. & C. Chaffe attempted to revive a money judgment against Mrs. E. W. Warfield, who had died in 1882, in the State of Tennessee, whither she had moved, in 1879, to reside permanently with her granddaughter. They caused to be cited Wm. Atkins, who had been appointed assignee of her estate in 1876 & who had disposed of all the property under his control, under & in accordance

with an order of the U. S. district court, & who had rendered his final account four years before.

Atkins was sick in bed & unable to attend to business at the time of the service, on the 9th of Feb., 1884. The attorney who filed an answer for him testified that Atkins did not employ him, & he didn't recollect who had.

Mrs. Warfield never obtained her discharge in bankruptcy; she was an old woman, & died, without having applied for it.

J. & C. Chaffe had R. G. Cobb appointed *curator ad hoc* to represent the absent heirs of Mrs. Warfield, who are proved to be residents of Mississippi & Missouri.

Cobb failed to take the oath required, & he was not cited. The Chaffes also had Allen Green, clerk of the dist. court, to be ap-
326 pointed *ex officio* administrator of the succession of Mrs. Warfield, which they alleged consisted of debts. Green was not cited either. Both Green & Cobb were appointed on the 9th of Feb., 1884, & both waived citation on the same day, 9th Feb., 1884. Both filed general denials for answers on the 18th Feb., 1884. On the 20th Feb., 1884, there was judgment for the full amount of the original judgment, although the petition for revival alleged that only a balance thereof remained due, & this record shows that the proceeds of the sales of property of the bankrupt had been applied to said judgment. On the 21st Feb., 1884, Atkins died.

The plaintiff in error maintained that the State court which rendered the judgment of revival was without jurisdiction *ratione personæ*, as neither Mrs. Warfield, the judgment debtor & defendant, nor her representative was cited, as required by article 3547 of the Revised Civil Code of Louisiana (already quoted); that the judgment of revival was an absolute nullity; that the original judgment was extinguished, & that his property could not be seized & sold under said alleged revived judgment; that to do so would be to take his property without due process of law.

The district court decided that the citation of Wm. Atkins, as assignee, was effectual to bring Mrs. Warfield, a deceased non-resident, into court, as her representative, & the supreme court of the State affirmed that judgment. That court said "the question of prescrip-
tion depends upon the validity & effect of the proceedings
327 taken against Warfield." If, therefore, Warfield was not cited either personally or through her agent or representative, her heirs or administrator, the judgment rendered could have no "validity or effect"—it was a nullity—& the judicial mortgage on the property of the plaintiff in error resulting from said judgment was extinguished, & the proceedings under it were without the sanction of law & were contrary to the first principles of justice. In other words, the plaintiff in error claims the right, under the fifth amendment & the 1st sect. of the fourteenth amendment of the Constitution of the United States, not to be deprived of his property without due process of law, & the State courts, in effect & practically, have denied him that right, in contravention of said provisions of the Constitution of the United States.

II. The State court decided, in effect, that Atkins, assignee, as such

was the representative of Mrs. Warfield, a bankrupt, who never obtained her discharge, & that she could be brought into court after her death & long after her permanent removal from the State of Louisiana by citing the said assignee, & therefore overruled the plea of prescription of ten years against the judgment of Chaffe *vs.* Warfield.

To arrive at such a conclusion the court had to construe both the bankrupt act of the United States of 1867 & the statute of Louis-
328 iana embraced in article 3547 of the Revised Civil Code so as to authorize constructive or substituted service of citation of a non-resident in a personal action. This court has often decided that such a law would be unconstitutional, being in violation of the 5th & 14th amendments aforesaid & contrary to the first principles of justice.

III. Plaintiff in error filed in the supreme court of the State the plea of prescription or limitation of two years, established by the bankrupt act of 1867, forbidding suits against the assignee after two years from his appointment, even if he were the representative of the judgment debtor in the sense of article 3547 of the Civil Code of Louisiana, but the State court disregarded said plea & statute & denied the right & immunity claimed by the plaintiff in error under said statute of the United States.

IV. Plaintiff maintains that Bon-air plantation was in the possession of & belonged to Mrs. Warfield in 1876, when she made a surrender of her property under the bankrupt act of Congress of 1867 & assigned it to Wm. Atkins, assignee, & that the title thereto vested in said assignee, & that an order was issued forbidding from selling the same; that the deputy sheriff (the sheriff having left the parish through fear of violence) was by intimidation forced
329 to make a sale, as already detailed, & he avers that said pretended sale was a nullity & that said Bon-air plantation should be subjected to the payment of the judgment of Chaffe *vs.* Warfield before said judgment can be enforced against the property of the plaintiff in error under article 765 of the Code of Practice of Louisiana, which is as follows:

"The purchaser against whom a suit is commenced by a creditor having a legal & judicial mortgage on the property of the debtor sued may require the creditor to discuss the other property which the debtor has in his possession, & even that which he has alienated since the purchase, because the creditor, who has a general mortgage, can only act against the property of which his debtor has disposed in the order in which the alienations have been made, beginning at the most recent & ascending to the most ancient."

He claims that, under the bankrupt act of 1876 & under the order issued by the register in bankruptcy, the sheriff could not dispossess the assignee and sell the property, after the assignment to Atkins, to pay a personal judgment against the bankrupt.

He claims the right, under the bankrupt act, to have said plantation disposed of by the assignee to pay said judgment before said judgment can be enforced against his property. This right the State court denied him.

V. Plaintiff in error maintains that the act of the legislature of Louisiana re-enacted in article 3547 of the Revised
330 Civil Code of Louisiana, in so far as it intended to or does authorize constructive service or substituted service of citation of a non-resident of the State in a personal action, as the State supreme court has, in effect, held in this case might be done, is unconstitutional, null, & void, being in contravention of the 5th amendment & the 1st sect. of 14th amendment of the Constitution, & the State court has affirmed the validity of said State statute.

6. Plaintiff in error assigns as error that the State court failed to decide that the *curator ad hoc* could not waive citation or any right of the defendant to interrupt prescription, & that there was no law of Louisiana to authorize the appointment of the clerk of the court administrator of an estate *ex officio*, & that said appointment was an absolute nullity.

7. The court further erred in not deciding that there had been no interruption of prescription of the judgment by citing the judgment debtor or his representative within ten years after the date of the judgment, to wit, 20 March, 1874, & that, therefore, the judgment & mortgage resulting from it were extinguished.

JNO. T. LUDELING,
In Pro. Per.

Endorsed on cover: Louisiana supreme court. No. 178. John T. Ludeling, plaintiff in error, *vs.* John Chaffe, Charles Chaffe, J. E. McGuire, sheriff, and Austin Green, clerk, &c. Filed October 8, 1888.

FILED,
JAN 4 1892
JAMES H. MCKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 178.

M. C. LUDELING, Ex'r, etc., Appellant,

vs.

JOHN and CHARLES CHAFFE et al., Appellees.

MOTION TO DISMISS.

Defendant in error respectfully moves the Court to dismiss the writ of error granted in this cause, on the ground that no question is presented by the record bringing the case within the jurisdiction of this honorable Court.

If this motion should be overruled, appellee prays for the affirmance of the judgment rendered herein and for general relief.

C. J. Boatner,
Of Counsel.

Office Supreme Court U. S.
FILED.
OCT 23 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

October Term, 1891.

MARIA COPLEY LUDELING,
FOR HERSELF AS UNIVERSAL LEGATEE,
AND AS EXECUTRIX OF
JOHN T. LUDELING, Deceased,
Appellant.

vs.

JOHN CHAFFE, CHAS. CHAFFE,
J. E. McGUIRE, Sheriff, and
AUSTIN GREEN, Clerk, &c.
Appellees.

No. 178.

Brief in behalf of Appellant.

JOHN T. LUDELING, *pro se.*
SHERMAN HARTWELL HUBBARD,
of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1891.

MARIA COPLEY LUDELING,
FOR HERSELF AS UNIVERSAL LEGATEE,
AND AS EXECUTRIX OF
JOHN T. LUDELING, Deceased,
Appellant,
vs.
J. & C. CHAFFE ET AL.,
Appellee.

No......

STATEMENT OF THE CASE.

On the 20th of March, 1874, J. and C. Chaffe obtained a judgment against Mrs. E. W. Warfield for $5000, subject to a credit of $2327.

On the 9th day of February, 1884, they attempted to revive that judgment, by citing William Atkins, who had been appointed assignee of Mrs. E. W. Warfield, in 1876.

On the same day they had R. J. Cobb appointed a curator *ad hoc*, to represent the absent heirs of Mrs. Warfield, who resided in the States of Missouri and Mississippi. He never took the oath required by law.

In 1879, Mrs. E. W. Warfield permanently removed from Louisiana to the State of Tennessee to live. She died in Tennessee in 1882.

No citation was issued to the curator *ad hoc* and none was served on him, but he *waived citation* on the 9th of Feb. 1884.

On the same day they had Austin Green, Clerk, appointed, *ex officio*, to administer the succession of Mrs. E. W. Warfield, and on the same day *he waived citation.* Mrs. Warfield did not own any property in Louisiana at that time.—R. pp. 42, 43.

Mr. Potts, who filed a *general denial* (practically a confession in this case,) for Atkins, testified that *Atkins* did not employ him, and he could not recollect (so he said,) who had employed him.

Cobb, curator *ad hoc* of absent heirs, and A. Green, Clerk of the District Court, also filed general denials. These answers were filed on the 18th day of February, 1884, *before* the expiration of the delay for appearance.

Judgment was rendered on the 19th of February, and signed on the 20th of February, 1884, and Atkins died on the 21st of February, 1884.

Notwithstanding the petition for the revival of the judgment alleged that "a large proportion of the same is yet unpaid and unsettled," (and it is not alleged what sum remained due and that all the property in the possession of the assignee had been transferred to Chaffe to pay his judgment,) there was judgment for the *full amount of the original judgment*, without any credits for the sale of "Bon Air" plantation, made in 1876, or for the property sold by the assignee under order of the Court, the proceeds of which were applied to the payment of the judgment of the Chaffes. Under this alleged revived judgment *execution* was issued and the property of the plaintiff in error, as third possessor, was seized and advertised for sale.

This property, "Oak Grove" plantation, plaintiff had acquired at the probate sale of the estate of Dr. Dinkgrave, who had acquired it from Mrs. Warfield in 1875, in the manner hereinafter stated.

This sale was enjoined by the plaintiff in error on the ground among others, that his property was about to be sold without "due process of law," that the judgment of revival was obtained by fraud and collusion, and *without citation upon the judgment debtor or her representative*, according to law, and was without any legal effect, and that the original judgment was extinguished by the prescription of ten years from its date, March 20th, 1874.

And on the further ground that "Bon Air" plantation was in the possession and belonged to Mrs. Warfield in 1876, when she went into bankruptcy, and the title thereto was vested in her assignee; that an order issued from the Bankrupt Court to the Sheriff, notifying him of said fact, and directing him not to sell the property advertised for sale; that the Sheriff's counsellor, Mr. Garrett, advised him not to sell the property, but the Deputy Sheriff (in the absence of the Sheriff, who had left the parish through fear of violence, on the advice of Mr. Farmer, one of Chaffe's attorneys,) was intimidated by threats made by C. H. Morrison, attorney for Chaffe, and he offered for sale only *such interest* as Mrs. Warfield had in and to said property on *that day*, and J. and C. Chaffe, through C. Chaffe, bid $3375, less than one-third of the value of the property.

The plaintiff in error claims the right to have that plantation, "Bon Air," subjected to the payment of the judgment of Chaffe against Warfield, before said judgment can be enforced against his property, "Oak Grove," if the judgment be not prescribed.

He claims that the Sheriff could not dispossess the assignee and sell the property, after the surrender in bankruptcy of Mrs. Warfield, and her assignment to the assignee, and that "Bon Air" plantation should have been disposed of by the assignee and the proceeds applied to the payment of the Chaffe judgment.

He claims a right, therefore, under the Bankrupt Act of 1867, which the State Courts have denied him.

The attorney appointed by the District Judge (who, having been the counsel of the seizing creditors, was excused,) to try this case, having decided that Atkins, assignee of Mrs. Warfield, was *her representative*, and was properly cited in the suit of revival, and an appeal having been taken to the Supreme Court of the State, Appellant, in addition to his pleadings in the lower Court, filed in the State Supreme Court, in accordance with the law and the practice in said Court, an assignment of errors, to wit :

1st. That the Act of the General Assembly of Louisiana of 1853, re-enacted in the Revised Civil Code as Article 3547, *as construed* by the Court, is repugnant to the first section of the 14th Amendment of the Constitution of the United States, (and the decision is in favor of its validity.)

That under the construction of the District Court (and of the State Supreme Court) of the said statute of Louisiana, the Court held that the *assignee* of Mrs. Warfield, a bankrupt, who was never discharged, who did not own any property in Louisiana, who was a resident of Tennessee when she died, and who had died at her domicile in Tennessee more than a year previously, could be legally cited to represent *her* in a *personal* action, about four years after the assignee had distributed all the proceeds of the estate of the bankrupt, under the order of the United States District Court, and had filed his final account thereof.

Plaintiff avers that said construction authorizes a substituted or constructive service of citation, in a personal action against a non-resident, and is not "due process of law," and is in violation of the 5th Amendment and of the 1st section of the 14th Amendment of the Constitution of the United States.

2d. That said Courts misconstrued the bankrupt act of the United States of March 2d, 1867, by deciding that the service of the citation on Atkins, assignee, above mentioned, was effectual to bring the bankrupt or his heirs, who are also non-residents, into Court, in a suit to revive a personal judgment against said bankrupt, and which judgment is being enforced against his property, alienated by Mrs. Warfield, the bankrupt, long before her surrender in bankruptcy. And he avers that said construction of said Act of Congress would make it contravene the 5th and 14th Amendments of the Constitution of the United States, which forbid any one from being deprived of life, liberty or property *without due process of law*, by recognizing a substituted or constructive service of citation.

3d. Plaintiff avers further that he interposed and plead the limitation established by said Bankrupt Act of March 2d, 1867, in bar of any suit against the assignee, or against the *citation* of the assignee, after two years from his appointment; and the decision was against the title, right, privilege or immunity specially set up and claimed by him under said statute.

He claims that no suit or action can be brought or revived against the assignee after two years from his appointment, and that, therefore, the judgment of Chaffe vs. Warfield was extinguished by prescription, and the mortgage against his property was also extinguished, and he claims the right and immunity, under the Constitution of the United States, not to be deprived of his property without due process of law.

The plaintiff in error was not a party to the suit of Chaffe vs. E. W. Warfield to revive the judgment, nor was he a party to any of the proceedings in bankruptcy, and when the judgment against Mrs. Warfield is attempted to be enforced against his property, he has the right to show the absolute nullity of said

judgment of revival for want of legal citation, and that the judgment and mortgage are extinguished.

A brief statement of the facts will show the inequity of the pretensions of J. and C. Chaffe, and the illegality of their proceedings.

Mrs. Warfield made a surrender of her property in bankruptcy in 1876. Atkins was appointed assignee and he took possession of her estate, consisting principally of real estate, shown to have been worth then from $10,000 to $15,000, besides the plantation called "Bon Air," which was proved to be worth from $8,000 to $10,000, when J. and C. Chaffe pretend to have bought it for $3,375, at a sale made under the following circumstances:

In 1875, under *consent* decrees, *waiving appraisement*, "Bon Air" plantation and "Oak Grove" plantation were advertised for sale as the property of Mrs. E. W. Warfield, the judgment debtor. By agreement between B. W. Richardson, the attorney of the seizing creditors, Mrs. Warfield and Dr. Dinkgrave, "Oak Grove" was released on condition that Dr. Dinkgrave should pay the State and Parish taxes due by Mrs. Warfield, and aggregating $3,100, as the price of "Oak Grove," and Mrs. Warfield should sell "Oak Grove" to Dr. Dinkgrave. (See testimony of Richardson, R. pp. 56, 57.) Dinkgrave paid said taxes with State and Parish warrants, and Mrs. Warfield executed a deed for "Oak Grove" to Dinkgrave; and the "Bon Air" plantation, with other property of Mrs. Warfield, was thus released from the mortgage in favor of the State and Parish for the said taxes. Dr. Dinkgrave took possession of "Oak Grove" and paid the taxes as agreed upon. He was at that time State

and Parish tax collector. Dr. Dinkgrave died in 1876. Hanna, who was his deputy and book-keeper, testified that Dinkgrave paid the taxes with warrants, and B. W. Richardson, attorney, corroborated him. Thus the lien or privilege on "Bon Air" and the other real estate of Mrs. Warfield was released.

By the law of Louisiana one who buys land and uses the price to pay a mortgage or privilege or taxes on the property, is subrogated to the rights resulting from the lien or privilege in favor of the State and Parish on said land, and Dinkgrave was thus subrogated.

The judge who rendered the judgment in this case decided that parol evidence could not be received to prove the *manner* in which the price was paid or by whom paid, and that, as the act of sale stated the price was "cash, the receipt whereof is acknowledged," therefore, if Dr. Dinkgrave paid the taxes he did so as the *agent* of Mrs. Warfield and was not subrogated.

The writs above mentioned were for about $2,145.20, with interest, on the day of sale of "Bon Air" plantation. The rents for "Bon Air" during that period when it was under seizure, (if it was ever seized,) to wit: during 1875 and 1876, amounted to not less than $2,000, and should have been applied to the payment of said writs. The evidence is conclusive that said plantation was leased to Parker, Calhoun and others during said years. The *alleged* seizure of "Bon Air" under said writs, was made on February 17th, 1875. But there was in reality *no seizure*. The sheriff never took possession of the place, nor did he notify the lessees of the seizure, or require them to attorn to him. The deputy who went out to make the seizure never had the writ. If there was a seizure of "Bon Air," the sheriff was bound to seize the rents, which must have extinguished the judgments on which the *fi. fa.* issued. The debts for which Miltenberger and Merrill obtained confessions of judgment and under which the alleged sale of "Bon Air" was made, were for the *rents* of lands adjoining "Bon Air" at $6 per acre.

The writs had expired in the hands of the sheriff, and no copies thereof had been taken, and the deputy had no writ in his hands when the alleged sale of "Bon Air" was made, and Mrs. E. W. Warfield had surrendered her property in bankruptcy, and the title thereto had vested in the assignee.

On the day of sale, the deputy sheriff, upon whom had been served some papers from the Bankrupt Court in relation to said property surrendered in bankruptcy, refused to make the sale unless an indemnity bond was given. Mr. C. H. Morrison, attorney for J. and C. Chaffe, threatened the deputy sheriff, who was also the sheriff's bondsman, with a suit if he did not make the sale that day; and on the advice of the sheriff's legal adviser, Mr. Garrett, the deputy sheriff offered for sale *only such interest in the property* as Mrs. Warfield had in and to said property *on that day*. This was not what had been advertised for sale.

The sale was advertised for cash, *without appraisement, at the first offering, under confession of judgment* made by *a bankrupt*. J. and C. Chaffe, represented by C. H. Morrison, attorney, and C. Chaffe, who was present, bid $3,375. It is alleged that $3,280.38 thereof was applied to the payment of the writs in the hands of the sheriff, to wit: in favor of Miltenberger and Merrill, L. D. McLain, Ex., and of Oliver and Byrne, and the balance $95.10 was credited on the *judicial mortgage* of J. and C. Chaffe by them. No part of the price bid was paid to the sheriff. If the *rents* had been collected and applied to the payment of the writs in the hands of the sheriff, there would have been not less than $2000 more to be credited on the Chaffe judgment on Sept. 16, 1876.

No returns on the *fi. fa.* have been made, and the deputy sheriff was coerced to sign the deed by Mr. Morrison's and Chaffe's employees, at his residence two miles from town, late at night, and after he had retired to bed on the night of the

day of sale. The deputy testified that he did not read the deed, but would have signed *anything* required of him at that time and under the circumstances.

"Bon Air" contained 560 acres of land, 220 acres thereof in cultivation, with 15 acres in a pecan grove just coming into bearing, situated on Bayou De Siard, about 5½ miles from Monroe, and running back to the railroad. It is well timbered and the woodland is shown to be first quality. The cleared land is proved to be worth from $25 to $30 per acre, and the woodland from $10 to $15 per acre. J. G. Sanders and other witnesses prove that the place was worth on the day of sale from $8,000 to $10,000. This is the property which the deputy sheriff was *coerced* by Morrison and Chaffe to sell, under the circumstances above stated, for cash, *without appraisement*, and for which J. and C. Chaffe bid $3,375.48, or about one-third of its value.—R. p. 63.

The sale being under *consent judgments*, and *on terms different from those prescribed by law*, was not a *judicial sale* and had none of its effects, and did not release the property from subsequent judicial mortgages.

3 Am. 195, Moore vs. Hampton; 5 Am. 499, LeCarpentier vs. LeCarpentier; 3 Am. 34, National Bank of Louisiana vs. Martin; 3 Am. 192.

In *Moore vs. Hampton et al.*, the Court said:

"A sale made by a sheriff under an agreement by parties and on terms different from those prescribed by law for forced sales, will not be viewed as a forced sale."

On page 195 the Court said:

"The interlocutory decree entered upon that agreement was nothing more than the authentication of it, and the sale made under it was not a forced sale. The purchaser derived his title

not from justice, though its officer pursued the strict forms of law, but from the consent of the owners that the sheriff should sell on terms which they prescribed."

In *LeCarpentier vs. LeCarpentier, 5 Am. 499*, the Court said:

"The sale in this case having been made under a consent decree, the partition has not the character of a *judicial* partition. . . . . Had the recitation been in all respects lawful, the property would not have passed into the hands of the purchaser free from the legal mortgage, which affected the share of one of the joint owners. . . . . Such an adjudication is not, in legal intendment, a partition. It is a sale and does not affect the rights of mortgage creditors."

In *Union Bank of Louisiana vs. Marin, 3 Am. p. 34*, the Court said:

"Decrees rendered by consent of parties decide nothing; they merely authenticate private agreements and render them executory *between the parties*. Their effect, as to third persons, is that of a transaction made in authentic form."

The assignee of Mrs. Warfield, and Mrs. Strother, a creditor, and J. and C. Chaffe, had a contest over this property and sale in the Bankrupt Court. The assignee obtained an order to sell the estate of the bankrupt, including "Bon Air." To this, opposition was made by J. and C. Chaffe. After considerable delay, and *evidently* after a compromise between the contestants, Atkins, assignee, Mrs. Strother, and J. and C. Chaffe, an arrangement was made by which all oppositions and contentions between themselves was withdrawn; the Clerk of the U. S. District Court testified that an order to sell the property of the *estate* of E. W. Warfield was made on June 16th, 1877. The sale was postponed to the 3d Monday of November, 1877. The sale was further postponed from time to time, exceptions taken and injunctions issued, and finally, *on April 15th, 1879*, the assignee *filed another petition for sale*. Mr. Ray, attorney for Mrs. Warfield and Mrs. Strother, withdrew their oppositions *to the sale*, and

Wm. T. Atkins withdrew his opposition to the judgment and claim of J. and C. Chaffe on the same day, April 15, 1879, and a judgment was signed on that day ordering the sale of all the property surrendered except "Bon Air," the sale whereof, it is said in the judgment, had been recognized in the State Court, and directing the proceeds, after paying costs and Ray's fee of $250, to be paid to J. and C. Chaffe, and directing the property to be sold for cash, *without appraisement*, and after only *three advertisements weekly*. Under this decree the assignee sold to J. and C. Chaffe the following property and for the prices stated, to wit:

(1.) House and lot in Monroe, La., situated on Front street, having 206 ft. front by 250 ft. deep, for $1500.00
R. p. 119.

(It is valued at $3000 on the schedule, R. p. 122, and is proved to have been worth when sold, $3,500 to $4,000.)

(2.) Vacant lot corner of Broad and Walnut streets, Monroe, La., 60½ by 165½ feet, for $200.00
R. p. 119.

(It is estimated in schedule at $300, R. p. 122.)

(3.) Claim against the United States, pending before the Southern Claims Commission, for horses, mules, cattle and wagons, taken by U. S. forces in 1863 and 1865, amounting to $3,331.60, for $10.00
R. p. 119.

(4.) 320 acres of land on railroad and adjoining "Bon Air," for $160.00
R. p. 119

(Estimated on schedule at $960, R. p. 122.)

(5.) $64\frac{75}{100}$ acres of land adjoining "Bon Air," on north side of Bayou, $32.00
R. p. 119.

(Estimated on schedule at $130, R. p. 122.)

(6.) 65 acres of land on railroad adjoining "Bon Air," for $32.50

R. p. 119.

Aggregating, $1,934.50

Thus it will be seen that under the arrangement made with the assignee and Mrs. Strother, J. and C. Chaffe *bought* these valuable lands, proved by competent witnesses in this case to be worth from $10 to $15 per acre, *for fifty cents per acre*, and a good claim against the U. S. Government amounting to $3,331.60, for *ten dollars*.

And J. and C. Chaffe having absorbed this valuable estate, worth, according to the testimony of experts in this case, from $17,000 to $20,000, under a judgment obtained in 1874 for about $3,000, magnanimously give, or released Mrs. Strother and her grandmother from the rents due for the dwelling-house to wit: $806.75 ; and paid John Ray, attorney for Mrs. Strother, $250, who stated that he had not collected the rents for the dwelling-house, as J. and C. Chaffe had remitted the rents to Mrs. Strother and Mrs. Warfield. And they claim that their judgment should be credited with only the net proceeds of the sales, and that the third possessors' property is bound for the balance of their judgment.

It is a familiar principle in equity, certainly applicable in Courts of this State, that no one should be permitted to so use his right as to destroy the rights of others. *24 Howard, 262, Gue vs. Tide Water Canal Co.*

Atkins, assignee, filed his account in the U. S. District Court at New Orleans, on Oct. 6, 1879, showing the sale of all the assets of the bankrupt E. W. Warfield, except "Bon Air" plantation, and accounting for the proceeds thereof, which all remained in the hands of J. and C. Chaffe, the purchasers and

mortgage creditors, declared to be entitled to payment by preference.

In the autumn of 1879 Mrs. Warfield removed from Louisiana with her granddaughter, Mrs. Strother, to Tennessee to reside, and there she died in 1882. On the 17th of October, 1881, a rule was filed calling upon the bankrupt to show cause why she should not *be denied her discharge*, for neglecting to take steps for obtaining her discharge seasonably. No further action was taken on this rule for want of service. Mrs. Warfield therefore died *without having obtained her discharge*.

In a supplemental or amended petition plaintiff states that from facts and circumstances which have come to his knowledge since suing out the injunction, he believes that said judgment in the suit of J. and C. Chaffe vs. E. W. Warfield, was acquired in part, if not in whole, by F. B. Stubbs, an attorney practicing in the Court; that said Stubbs instigated the institution of the hypothecary action of J. and C. Chaffe vs. J. T. Ludeling; that he was to have a proportion of the judgment, if recovered, and nothing if he failed, and was to pay all the costs and other expenses of the suit. Plaintiff further states that previously, J. and C. Chaffe had entered into an agreement with Mrs. Strother, a creditor, and wife of Dr. R. C. Strother, Atkins, assignee, and Mrs. Warfield, all now dead, whereby the contest in the Bankrupt Court in relation to "Bon Air" and other property was settled, and that a part of said agreement or compromise was that the opposition to Chaffe's title to "Bon Air" plantation should be withdrawn, and their assent should be given to a judgment to sell the other property in the hands of the assignee for cash, without appraisement, and that Chaffe should buy the property in satisfaction of his debt and should release Strother and Mrs. Warfield from paying rents for the dwelling house, and pay the attorney of the assignee and Mrs.

Strother $250; and interrogatories on facts and articles were propounded to J. and C. Chaffe, and prayer for a trial by jury was made. The affidavit required by law was made to the amended petition. To the filing of this amended petition, defendants objected, and they moved to strike out a part thereof, which was done. To which ruling plaintiff excepted, R. p. 31.

It is submitted that the amended petition should have been allowed and that J. and C. Chaffe should have been ordered to answer the interrogatories, and the attention of the Court is especially called to the bill of exceptions taken to this ruling. The minutes of the Court and the bill will show that at the first calling of this case, and in the absence of plaintiff it was *fixed* for trial *without prejudice*. And yet, when the amendment was offered, it was said that the application for trial by jury came too late, and that the interrogatories and parts of the amended petition changed the substance of the demand.

Surely there is nothing in the supplemental petition and interrogatories which might not have been incorporated in the original petition, and the application for a jury was in time at any period before the case had been fixed for trial absolutely.

The purpose of the amended petition was to show that after the sale of the property constituting the bankrupt's *estate*, J. and C. Chaffe ceased in their efforts to collect more on their judgment, *because* of their above said compromise with Atkins, Mrs. Warfield and Mrs. Strother, from the date of sale in the autumn of 1879 until about 1882, when the hypothecary action was instituted, as alleged in the amended petition, at the instigation of F. P. Stubbs, an attorney, who was to receive a part of the judgment as a fee and to pay the costs and expenses of the suit, *after* Baker, Strother and Mrs. Warfield, the parties to the transactions with the Chaffes, *had died*.

If J. and C. Chaffe had not known that said agreement had

been made and feared it might be proved, why did *they, wealthy merchants*, employ an attorney with a contingent fee and on condition that he should pay all expenses of the suit? Why did they wait until after the parties to the transaction had died? Why did they refuse or object to answer the questions on this subject while answering others?

II.—ASSIGNMENT OF ERRORS.

1st. In 1884, J. and C. Chaffe attempted to revive a personal judgment against Mrs. E. W. Warfield, who had died in 1882, in the State of Tennessee, whither she had moved in 1879 to permanently reside with her granddaughter.

They caused to be cited William Atkins, who had been appointed assignee of her estate in 1876, and who had disposed of all the property under his control under an order of the U. S. District Court, and who had rendered his final account four years before. Atkins was sick, in bed, at the time of service of citation on Feb. 9th, 1884, and he died on Feb. 21st, 1884. Mr. Potts, who filed an answer for him, (practically a confession,) testified that Mr. Atkins did not employ him, and he didn't recollect who had.

Mrs. Warfield never obtained her discharge in bankruptcy.

J. and C. Chaffe also had R. G. Cobb appointed curator *ad hoc* to represent the absent heirs of Mrs. Warfield, who are proved to be residents of Mississippi and Missouri. Cobb failed to take the oath required and *was not cited.*

They also caused Austin Green, Clerk of the District Court, to be appointed, *ex officio*, administrator of the succession of Mrs. Warfield, which they allege consisted of debts. Green *was not cited either.*

Both Cobb and Green were appointed on February 9th, 1884, and both *waived citation* on February 9th, 1884.

Both filed answers, general denials, on February 18th, *before the expiration of the delay to answer*. On February 20th judgment was rendered for the full amount of the original judgment, (although the petition alleged that there had been payments thereon,) and on February 21st Atkins died.

The plaintiff in error maintained that the State Court which rendered the judgment of revival, was without jurisdiction, as neither Mrs. Warfield nor her representative was cited, as required by Article 3547 of the Civil Code of Louisiana: that the judgment of revival was an absolute nullity; that the original judgment was extinguished by prescription; and that his property could not be seized and sold under said alleged *revival judgment*, as to do so would be to take his property without due process of law.

The District Court decided that the citation of William Atkins, assignee, was effectual to bring Mrs. Warfield, a deceased non-resident, into Court, and the Supreme Court of the State affirmed that judgment.

That Court said:

"The question of prescription depends upon the validity and effect of the proceedings taken against Warfield."

If, therefore, Warfield was not cited, the judgment rendered was a nullity, and the judicial mortgage on the property of the plaintiff in error, resulting from said judgment, was extinguished, and the proceedings under it were without sanction of law and contrary to the first principles of justice.

In other words, the plaintiff in error claims the right, under the Fifth Amendment and the first section of the Fourteenth Amendment of the Constitution of the United States, not to be deprived of his property without due process of law, and that the State Courts, in effect and practically, have denied

him that right, in contravention of said provisions of the Constitution of the United States.

2d. The State Court decided that Atkins, assignee, as such, was the representative of Mrs. Warfield, a bankrupt who *never obtained her discharge*, and that she could be brought into Court after her death, and long after her permanent removal from the State of Louisiana, by citing said assignee, and therefore overruled the plea of prescription of ten years against the judgment of Chaffe vs. Warfield.

To arrive at such a conclusion the Court had to construe both the bankrupt law of the United States of 1867 and the statute of Louisiana embraced in Article 3547 of the Revised Civil Code of Louisiana, so as to authorize constructive or substituted service of citation of a non-resident, (who had died,) in a *personal action*. This Court has often decided that such a proceeding was unconstitutional and contrary to the first principles of justice.

3d. Plaintiff in error filed in the Supreme Court of the State the plea of prescription or limitation of two years, under section 5057 of the Act of 1867, (Revised Statutes, page 982,) forbidding suits against the assignee after two years from his appointment, even if Atkins was the representative of the judgment debtor, in the sense of Article 3547 of the Civil Code of Lonisiana. But the State Court disregarded said plea and statute, and denied the right and immunity claimed by the plaintiff in error under said statute of the United States.

4th. Plaintiff maintains that "Bon Air" plantation was in the possession of and belonged to Mrs. E. W. Warfield in 1876, when she made a surrender of her property under the Bankrupt Act of Congress of 1867, and assigned it to Wm. Atkins, assignee, and that the title thereto vested in said assignee, and

that an order was issued by the Register in Bankruptcy, notifying the sheriff of said fact and forbidding him from selling the same; that the deputy sheriff (the sheriff having left the parish through fear of violence,) was, by intimidation, forced to make a sale, as already detailed; and he avers that the said pretended sale was a nullity and that the said "Bon Air" plantation should be subjected to the payment of the judgment of Chaffe vs. Warfield, before said judgment can be enforced against the property of the plaintiff in error, under Article 715 of the Code of Practice, which is as follows:

"The purchaser, against whom a suit is commenced by a creditor having a legal or judicial mortgage on the property of the debtor sued, may require the creditor to discuss the other property which the debtor has in his possession, *and even that which he has alienated since the purchase, because* the creditor who has a general mortgage can only act against the property of which his debtor is dispossessed in the order *in which the alienations have been made, beginning at the most recent and ascending to the most ancient.*"

III.—POINTS OF LAW AND FACTS DISCUSSED.

It is contended by defendant in error that the question involved in this case is *only prescription, vel non*, and that the *State* Court has absolute and exclusive control over that question.

Both propositions are denied by the plaintiff in error.

He maintains that the questions which arise in this case are stated in the assignment of errors, and are, whether the *State Court* can deprive him of his property without due process of law by its misconstruction of the bankrupt act.

He claims that the construction of the statute of Louisiana, Article 3547 of the Civil Code, by the State Court, would make

it unconstitutional, by authorizing substituted or constructive service of citation on a non-resident, and the Court held in effect that the law as construed was valid.

Plaintiff affirmed that the construction of the Bankrupt Act of Congress by the Court would make it unconstitutional for the same reason, and thereby deprive him of a right or immunity claimed.

Plaintiff averred that if the construction placed by the Court on that Act of Congress be authorized, then the action or suit to revive the judgment against the assignee was barred by the limitation of two years, and he claims that said suit did not interrupt the prescription of the judgment against Mrs. Warfield, and that the mortgage was therefore extinguished. This right or immunity was denied him by the State Court.

He further claimed that the title to "Bon Air" plantation was vested in the assignee in 1876, and that the sheriff could not dispossess the assignee thereof, or sell it, *after* the assignment, and that said plantation should be subjected to the mortgage of J. and C. Chaffe (if it exists) before attacking plaintiff's property, and this right was also denied him.

This Court said in *Hall vs. Jordan, 15 Wall. 393:*

However frivolous the question, if it raise a question under the 25th section of the judiciary act, the decision may be revised by this Court upon a writ of error."

In *Gregory vs. McVeigh, 23 Wall.*, this Court said:

"It is sufficient to say that we think the case involves a Federal question." And the motion to dismiss was denied.

If the highest Court of a State affirms the judgment of an inferior Court the presumption is that it did so on the ground on which the inferior Court acted, or which was raised by the record. *97 U. S. 454; 2 Peters, 380.*

In *Pennoyer vs. Neff, 5 Otto, 733*, this Court said:

"Since the adoption of the 14th Amendment to the Federal Constitution the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution, that is, by the law of its creation, to pass upon the subject matter of the suit; and, if that involves merely the determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

In *ex parte Virginia* this Court said:

"A State acts by its legislature, its executive, or its *judicial authorities*. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State or of its officers or agents, by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position, under a State government, deprives another of property, life or liberty, without due process of law, or denies, or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts in the name of the State and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." *10 Otto, 347*.

In *Virginia vs. Rives, 10 Otto, p. 319*, the Court says:

"It is obvious, therefore, that to such a case, that is, a judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced. Section 641 has no application.

It left them to the revising power of the higher courts of the State, *and ultimately to the review of this Court.*"

"What constitutes a case arising under the constitution and laws of the United States was defined in 6 Wheat. It is not merely one where a party comes into Court to demand something conferred upon him by the constitution, or by a law or treaty. A case consists of the right of one party as well as of the other, and may truly be said to arise under the constitution or a law, or a treaty of the United States whenever *its correct decision* depends upon *the construction* of either. Cases arising under the laws of the United States are such as grow out of legislation of Congress, whether they constitute the right or privilege or claim or protection or defence of the party, in whole or in part, by whom they are asserted. Story on Constitution, sec. 1647 ; 6 Wheat. 379." *Tennessee vs. Davis, 10 Otto, 264.*

It is not denied the Legislature of the State has control over the question of prescription, that is, it may establish, regulate, or abolish prescription. But having established a prescription of judgments by ten years, unless the judgment be revived by a citation issued to the defendant or his representative, the *Courts* cannot revive a judgment *without such citation* or personal appearance. Prescription once *acquired* is a vested right. 12 Rob. 270.

And the Courts cannot deprive a defendant of this right any more than they can deprive the judgment debtor or any one holding property bought from him, of any other vested right without due process of law.

The Civil Code, Art. 3457, declares—

"Prescription is the manner of acquiring the ownership of property, or discharging debts, by the effect of time, and under the conditions regulated by law."

Art. 3459 (Civil Code) says :

"The prescription by which debts are released is a peremptory and perpetual bar to every species of action, real or personal, when the creditor has been silent for a certain time, without urging his claim."

Art. 3411 (Civil Code) declares—

"Mortgages are extinguished
By the extinction of the thing mortgaged;
By the creditor acquiring the thing mortgaged;
By the extinction of the mortgagor's right;
By the extinction of *the debt* for which the mortgage was given;
By the creditor renouncing the mortgage;
By *prescription.*

The Court, therefore, had no more right or authority to order the sale of the third possessor's lands, under the *alleged revived judgment*, than it had to order the sale *without any judgment whatever.*

The proceedings in this case are manifestly not in accordance with the "law of the land."

Judge Cooley says:

"Individual citizens require protection against *judicial* action as well as against legislative, and perhaps the question, what constitutes due process of law, is as often made in regard to judicial proceedings as in any other case. But it is not so difficult here to arrive at satisfactory conclusions, since the bounds of judicial authority are much better defined than those of the legislative, and each case can generally be brought to a definite and well settled test. The proceedings in any Court are void if it wants jurisdiction of the case in which it has assumed to act. Jurisdiction is *first* of the subject matter; and *second of the person* whose rights are to be passed upon." *Cooley's Constitutional Limitations, page 398.*

But to render the jurisdiction of a court effectual, *in any case*, it is necessary that the *thing* in controversy, or the *parties interested*, be subjected to the process of the Court. *Cooley's Const. Lim. p. 402.*

"Suits at common law proceed against the *parties whose interests* are sought to be affected; and only those persons are concluded by the adjudication who are served with process or

who voluntarily appear. . . . . But notice cannot be made to stand in place of process, so as to subject defendant to valid judgment against him personally. . . . . The fact that *process was not served personally is conclusive* objection to the judgment as to a personal claim . . . . . and due process of law would require *appearance or personal service* before defendant could be *personally bound by any judgment rendered.*" *Cooley's Const. Lim. pp. 403, 404, 405.*

It is certain that the defendant, Mrs. Warfield, was not cited. She had lived in another State for several years and had died there some time before the issuance thereof.

Was her "representative" cited? No! *Her* representatives were her grandchildren, one of whom lived in St. Louis, Mo., and the other in the State of Mississippi.

But the State Court held, in this case, that the citation of Atkins, assignee, was effective, he being her representative.

Who constituted Atkins her representative? By what law or authority did he represent her?

Even if it were true that an assignee in bankruptcy ever was the representative of the bankrupt, he could not be of a bankrupt who had never been discharged, and *after* said assignee had disposed of *all of the estate of the bankrupt* and distributed the proceeds thereof under an order of Court, and rendered his final account years before. What possible interest could *he* have in the proceeding to revive a judgment against the dead bankrupt?

The Supreme Court of Louisiana has held that neither an assignee who had been discharged, nor a discharged bankrupt, could be cited in an action to revive a judgment, *because neither had any interest in the matter. 23 An. 180; 25 An. 556; 27 An. 242; 33 An. 1020.*

In that case the Court says:

"The question, then, for our decision is, was the service on

Norton, long after he had ceased to be assignee of the bankrupt Sims, by discharge, under order of the Court, such *legal citation* to the defendant or his representative," as would maintain a judgment of revival, and they decided that it was not.

What is the difference between citing an assignee who had been discharged by an order of Court, and citing one who was *functus officio*, by reason of having disposed of *all* the estate of the bankrupt and accounted for the same to the Court, in accordance with its decree, and when his said account has not been opposed but affirmed? In neither case has he any interest in the matter, nor can he be affected by the proceeding.

But the question has been expressly, pointedly and fully decided by the Supreme Court of Louisiana several times.

In *27 An. 18, Serra e Hijo vs. Hoffman & Co.*, pending appeal in the Supreme Court, counsel for appellees suggested that appellants had been adjudged bankrupts since the appeal was taken, and that E. W. Norton had been appointed assignee, and moved the Court to order that the assignee be made a party, etc. The assignee took no notice of the order, and the Court said:

"We do not find anything in the bankrupt act which requires the assignee, or which authorizes any court to compel him, to become a party to a suit brought by or against a bankrupt. . . . It is no part of the business of the assignee to *protect the bankrupt*, and it would not be proper for him to tax the estate with costs and expense of litigation *from which no benefit* could result to the estate. . . . . What the law *permits and enables* the assignee to do, in the exercise of a sound discretion, it nowhere *commands* him to do, and if he does not choose to become a party, voluntarily, to a suit pending in the name of the bankrupt, we do not think that any court, in which such suit may be pending, *has the power or authority to make him a party, or compel him to submit to its jurisdiction and control*, ... There is a wide difference between the effect of the death and the effect of the *bankruptcy* of a party to a suit. Death puts an end

to all judicial procedings in the name of the deceased, and no steps can be taken until his proper legal representative is made a party in his stead. Bankruptcy vests in the assignee the right to prosecute the suits in which the bankrupt is the actor, where the thing sued for might or ought to pass to the assignee by the assignment. . . . . But this is not because the bankrupt is *civiliter mortuus*. Nothing in the law gives any such effect to the bankruptcy."

In *Chapman, Executrix, vs. Nelson et als., 31 An. 342,* plaintiff sued to revive a judgment against Nelson, a *discharged* bankrupt. A curator *ad hoc* was appointed to represent him and was cited. The Citizens Bank and Norton, *assignee*, were made parties and cited. Norton, assignee, made no appearance and default was taken against him. The Court *a quo* held that Nelson, *being a discharged bankrupt*, could not be cited; that Norton, assignee, was the representative of Nelson, or of his estate, and the Bank was Nelson's representative, *quo ad* the property, and it dismissed the suit as to Nelson, but maintained it against Norton and the Bank, limiting the effect of judgment against Norton, as assignee, and to have effect only against the *estate* in bankruptcy.

On appeal the State Supreme Court said:

"The Act of 1853, re-enacted in the revised statutes (section 2813) and embodied in the Revised Civil Code as Article 3547, after declaring that judgments for money shall be prescribed by the lapse of ten years after they are rendered, provides, however, that any party interested in said judgment may have the same revived, at any time before it is prescribed, by having a *citation issued according to law, to the defendant or his representative*. . . . . This statute evidently contemplates but two parties to the proceeding, the judgment creditor (the plaintiff or such other person as may be intended in the judgment,) and the judgment debtor, the defendant in the original suit. The word 'representative' simply means the *agent or attorney in fact*, if the defendant be living, or the *curator, executor or administrator*, or the *heir*, as the case may be, if he be dead; the person having authority and capacity by appointment of

the defendant, if he be living, or by judicial appointment, or by the effect of law, if he be dead, to be cited and to stand in judgment in his room and stead. If he be living, absent and not represented, he must be cited through the *curator ad hoc*, appointed by the Court for that purpose. . . . . The naked question is, has the plaintiff the right to have the judgment revived in this proceeding, and the question is to be determined solely between the plaintiff, the judgment creditor or his legal representatives, and the judgment debtor, the defendant or his legal representative. . . . . The assignee is the representative *of the creditors*, so far as the *estate* of the bankrupt is concerned; but *he is not* the representative *of the bankrupt*, for the very good reason that the bankrupt has no rights or interests to be protected or represented. By the surrender he abandons his rights, credits, effects and property to his creditors; and the law discharges him from his liability for debts contracted prior to the date of the surrender, and provable against his estate in bankruptcy."

And the Court adds: "See *Serra e Hijo vs. Hoffman, 29 An. 18–23*, where this subject is fully discussed."

And the Court declares—

"*The assignee is not the representative of the judgment debtor*, the defendant, *in the sense of the Act of 1853;* and the bankrupt *cannot* be brought into Court for ANY PURPOSE *by citing the assignee.*"

See *23 An. 180, Hopgood vs. Dawson.*

The attention of the Court is called to the fact that Mrs. Warfield *never got her discharge*. It is so alleged in the petition to revive the judgment. She was a very old lady. It will hardly be contended that the *assignee* could be the representative of a bankrupt who was never discharged, and that, too, after all the *estate* of the bankrupt had been sold and the proceeds thereof applied, under the terms of the judgment of the Court ordering the sale, to the payment of the judgment sought to be revived, about four years after the assignee had rendered his account and was *functus officio*. See *Bump, pp. 115, 684, §§ 5105, 5112, 1112.*

In *Willard vs. Brigham, 25 An. p. 602*, the Supreme Court of Louisiana said:

"The property had passed out of the jurisdiction of the bankrupt court, therefore it was useless to cite the assignee in a proceeding against the hypothecated property, *because he had no interest therein.*"

What interest could the dying assignee, Atkins, have in the suit to *revive a judgment* against the bankrupt in this case?

The attention of the Court is further called to the fact that "Oak Grove," the property seized under the alleged revived judgment, never formed a part of the "*estate*" of the bankrupt which was surrendered to Atkins, assignee, as it had been sold several years anterior to the surrender in bankruptcy of Mrs. Warfield.

How it ever could be supposed that the assignee was the *representative* of the *bankrupt* it is difficult to conceive. He is an officer of the bankrupt court. He is elected by the *creditors* or appointed by the register, and the property of the bankrupt is assigned to him and the title thereto vested in him for the benefit of the creditors. It is contended that the Supreme Court of Louisiana held that he was the representative of the bankrupt in *25 An. 555, Kennedy vs. Rust*, and in *27 An. 242, Alter vs. S. O. Nelson.*

This is a strange mistake.

In *Kennedy vs. Rust, 25 An. 555*, the Court held that the *discharged bankrupt*, Rust, could not be cited in a suit to revive the judgment.

"He had made a surrender in bankruptcy, the property in bankruptcy had been sold by the assignee. He, Rust, was no longer a *party in interest*. He could not be represented in this case by a curator *ad hoc* appointed for that purpose, upon whom the citation was served. The appointment of a curator *ad hoc* and the citation served upon him were nullities. There was then no citation and the prescription took effect."

There is not one word said in this decision about the assignee being the representative of the judgment debtor. There was no other question involved in that case.

In *Alter vs. S. O. Nelson & Co. 27 An. 242*, the Court said:

"On the 16th of June, 1863, the plaintiff obtained judgment against defendants, *in solido*, for $25,000. On June 10th, 1873, he brought this suit to revive said judgment, serving citation only on S. O. Nelson. In bar of this proceeding, the defendant, S. O. Nelson, pleaded his discharge in bankruptcy. The Court gave judgment for this defendant and the plaintiff appealed."

The higher Court said:

"We think the Court did not err. The discharge in bankruptcy released the defendant from paying the judgment. And if the object of the plaintiff was, as he says, merely to avert prescription of the judgment in order to preserve the judicial mortgage resulting from recording the judgment in the Parish of Iberia, where the defendant owned immovable property, that object could not be accomplished by citing the defendant, the discharged bankrupt, who is without interest. It was a vain thing to cite him, because he could not be held personally liable."

What followed was *obiter dicta* and decided nothing. It was a mere suggestion of a possible case, "and," added the Court, "whether or not a judicial mortgage should be perpetuated *against the bankrupt's estate* by reviving the judgment was a question that might interest the assignee, *the special representative of the ordinary creditors*, but in no manner concerned the bankrupt, who had surrendered his entire estate. Judgment affirmed."

It is manifest that the only question raised and decided was that the *discharged* bankrupt could not be cited in a suit to revive, and the organ of the Court said, *obiter*, that *whether or not* a judicial mortgage can be perpetuated against a bankrupt's estate (the property surrendered,) was a question which *might*

interest the assignee. But that question was not involved in that case and was not decided.

The Supreme Court of Louisiana said in the present case, that the Court held that citation on the discharged bankrupt "was unavailing, and certainly *suggest*, as the only alternative, that the assignee was the proper party." What the Court said in that case, (27 An. 342,) has been quoted in this brief, and it is submitted that no such suggestion was made by the Court. It was said that it *might interest the assignee* whether or not a judgment and mortgage should be revived against the "ESTATE" (property) surrendered, but no suggestion was made as to his being the *representative of defendant*, upon whom citation could be served to revive a judgment.

The Court cited *Wheless vs. Fisk, 28 An. 731.* This is what it said in that case:

"On February 1st, 187 , the *defendant took a suspensive appeal* from a judgment against him for $977.46. *He was subsequently* adjudged a bankrupt and at the trial in this Court offered his discharge in bar of the action against him, and prayed that the appeal herein be dismissed. The discharge granted by the bankrupt court to the defendant will protect him from further responsibility, but it cannot avail to dismiss the appeal. The plaintiffs have a right to make the surety on the appeal bond liable in case it should be determined that the judgment appealed from is correct. This Court has authority to revise that judgment and settle the controversy, *because*, as we have just decided in the case of Switzer vs. Heime, *where the State Court has obtained lawful jurisdiction of the parties and the subject matter*, that jurisdiction continues as long as the amount due is in dispute or remains unascertained. *Bump on Bankruptcy, 6th edition, pages 187, 198, 199,* and authorities there cited. The assignee, however, has not been cited. It is therefore ordered that this case be continued, in order to make the assignee of the bankrupt, F. M. Fisk, a party to this appeal."

And the Court held that *Serra vs. Hoffman, 29 An. 17*, was similar to Wheless vs. Fisk, and the Court there held that the

assignee could not be made a party. I submit that from all the Court said it is clear that the Court considered that it had no right to compel the appearance of the assignee, but ought to give him notice of the pending suit to enable him to appear if he chose.

Neither are the cases similar. In the first case there was a motion to dismiss the appeal, because of the discharge of the bankrupt: in the other there was an application for an order to have Norton, assignee, made a party to the appeal.

Enough of this opinion has been quoted to show the facts and what was decided.

Again, it is represented that in *Chapman vs. Nelson, 31 An. 341*, where the Court certainly says that "the assignee is not a necessary or proper party in a proceeding to revive a judgment against a bankrupt," that the *dicta* on thas point were *obiter*, because the case went off on the question of jurisdiction. The only questions in the case were questions relating to the jurisdiction, first, as to whether the proper parties *were cited*, and next as to the subject matter. Both were presented and argued and decided. The decision of the first question, therefore, was not *obiter*.

The next case referred to by the Court is *Grayson, Ex. vs. Norton, 33 An. 1018.*

In that case the Court said:

"In the opinion of the Court rendered in the re-hearing granted in the previous appeal, the Court said, 'We held that, in this suit, the citation should have been issued to and served upon the judgment debtor or his legal representative, reversed the decree of revival and dismissed plaintiff's demand. We are *now told by his counsel* that, in instituting these proceedings we carefully followed, as the evidence of what the law was, a rule established and twice sanctioned by your predecessors. This is true, and as a member of the Bar we understand the important necessity of not departing from a rule of practice, which,

however questionable it may be, has for several years been a guide to litigants. *25 An. 556; 27 An. 242.* . . . . Whatever may be the views which we entertain as to this matter, plaintiff has properly invoked the rule *stare decisis*, and, *as in this instance, no interest can be affected by its application, we adhere to it.* The decisions in which the Court relied, *25 An. 556* and *27 An. 242*, do not, in our opinion, *apply to this case.* In these cases it does not appear, nor is it claimed, that the assignee was *functus officio.* . . . . The question, then, for our decision is, was the service on Norton, long after he had ceased to be assignee of the bankrupt (Sims) by discharge under an order of Court, regularly made, such legal citation to the defendant or his representative, as would maintain a judgment of revival. *Without in any manner overruling the cases*, we only say that they do not cover nor are they applicable to the instant cause."

This case, therefore, only decided that an assignee who was *functus officio*, did not represent the bankrupt and could not be cited in a suit to revive. It expressly stated that the cases in 25 An. and 27 An. were not reversed, and had no application to the instant cause.

These cases have already been quoted in this brief and it is confidently submitted that *neither of them* decides that an assignee of a discharged bankrupt can represent the bankrupt in a suit to revive a judgment for money, and therefore that the Court was misled by the bold but unfounded statement of counsel that that question had been decided in these cases and constituted *stare decisis*.

The case of Grayson, Ex. vs. Norton was decided in 1881 ; the case of Serra e Hijo vs. Hoffman, 29 An., was decided in 1877 ; and the case of Chapman, Ex. vs. Nelson et al. 31 An., was decided in April, 1879.

In these cases the Court expressly decided the very question at issue in this case.

At the time the Grayson case was decided these were the

last expresions of the Court on the question, and if the rule *stare decisis* is so important, why was not the rule adhered to then and since?

The last case referred to be the Court is *Stackhouse vs. Zuntz 36 An. 534*, in which it says:

"In addition to the above, the *assignee* in bankruptcy of Mr. Stackhouse, *interposed the discharge of the bankrupt against the revival of the judgment against him.* The action is not intended to impose or renew any liability against the bankrupt, from which he has been discharged. The assignee is the sole representative of the bankrupt's *estate*, and it *may be that the judgment confers some right upon or against the estate, though the bankrupt may have been discharged from personal liability.* We think the assignee was properly made a party to the action, and the only one that could represent the bankrupt debtor or his estate."

And the cases of *Alter vs. Nelson, 27 An. 242, Grayson vs. Norton* and *Wheless vs. Fisk, 28 An. 731*, were cited.

It is submitted that the question of the *right to bring* the assignee in the suit was *not raised by the pleadings.* The only question raised, it appears from the statement of the case by the Court (which is quoted above,) was whether the judgment against the bankrupt could be *revived after his discharge.* This question was raised by the assignee *voluntarily*, pleading the discharge of the bankrupt against the *revival.* All that was said about his representing the debtor, etc., is *obiter* and directly in contradiction to Serra e Hijo vs. Hoffman and Chapman vs. Nelson already quoted. And neither of these cases is referred to by the Court in the Stackhouse case.

Besides, it appears that a part of the "estate" of the bankrupt subject to the judicial mortgage created by the registry of Zuntz's judgment *was in the possession of the assignee.*

Whereas in the present suit such was *not* the case, and all the property or estate of Mrs. Warfield, the bankrupt, had been

sold by order of the U. S. District Court, and distributed and accounted for by the assignee except "Bon Air," which had been previously disposed of under execution, and Chaffe had bought everything to pay his judgment.

Were the "representatives" of Mrs. Warfield, the absent heirs, cited through the curator *ad hoc?* *No citation was ever issued to him.* R. p. 109.

Consequently none was served on him.

But defendant contended in the State Court that the curator *ad hoc waived citation*, and filed an answer, which dispensed with citation.

The curator *ad hoc* had no right to file an answer till he had been cited; and he could not waive citation, or any other right of the absentees. *17 La. 117, Collins vs. Beirce.*

In *Hill et als. vs. Barlow et als. 6 Rob. 144*, the Court said:

"It is, therefore, *necessary*, that the party be cited; and it cannot be controverted, that any other means of knowledge of the proceedings instituted against him, brought home to the party against whom prescription is sought to be legally interrupted, would *not be sufficient* to interrupt prescription, in the true sense of the law. Now, in this case, the Commercial Bank having been made a party to the suit by the appointment of a curator *ad hoc*, said curator *acknowledged service* of the citation without waiting for the issuing of the process and for its service upon himself according to law. . . . . It is said, however, that the *acceptance* of service by the curator *ad hoc* amounts to a legal interruption of the prescription of one year, and is binding upon the Bank. Art. 57 of the Civil Code provides that 'if a suit be instituted against an absentee, who has no known agent in the State, the judge before whom the suit is pending shall appoint a curator *ad hoc* to DEFEND the absentee in the suit.' The same provision exists in Articles 116, 964 of the Code of Practice; and the *object* of the law appears clearly to be that the *interests* of the *absentee* should not be sacrificed in his absence, but that on the contrary, his *rights* should be well *defended*, and in the same manner as if he were present. After the curator *ad hoc* has been appointed to an absent person, the

law requires that the petition and citation should be *served* upon him. C. P. Arts. 194, 195. . . . . And we are not ready to say that Art. 177 of the same Code, which provides for the waiver or acknowledgement of service to be written on the back of the original petition, by the defendant or his attorney, should apply to the curator *ad hoc*, since from the terms of the law, it seems that such a waiver or acknowledgement is only to be made by the defendant personally, or by his attorney whom he has employed. This *service* of the petition upon the curator *ad hoc* amounts to a notification of his appointment—until then he has no capacity to act as such, and it appears to us at least irregular, if not illegal, that he should take notice of his appointment and bring the absentee before the Court by a simple acknowledgement of the *service* of citation or by a waiver thereof. This is not one of the modes recognized by law, by which an absentee can be called before a court of justice to answer a demand made against him by one of our citizens.

"The *process* should be *regularly served* upon the curator appointed to defend him; and it seems to us that the latter can not *waive* any of those legal proceedings which are instituted and required for the protection of the rights of the absentee, whom he is called upon to defend. In 10 Martin, 474, this Court held that every law that permits our Courts to decide on the rights of those who are absent should be construed strictly and that the formalities which it prescribed in allowing a creditor to pursue his debtor in this way, ought to be exactly followed. If this be correct, and we do not doubt the correctness of the doctrine, it follows, that the acknowledgement of service made in this way by the curator *ad hoc*, was an *illegal act* on his part, and that, as such, it cannot prejudice the appellees. . . . And in this case we must come to the conclusion that the curator *ad hoc* had *no* authority to *waive* service of citation, and by his voluntary act to cause the legal interruption of prescription set up as a peremptory exception by the appellees."

In Hyde vs. Craddie the Court said that "a curator *ad hoc* appointed by the Court to represent an absent defendant, cannot be permitted to waive any of the legal rights of the party he represents. 10 Rob. 393.

In *Krughler vs. The Bank of the United States, 12 Rob. 465,*

although the curator *ad hoc* had filed an answer, the Court held that the absentee had to be brought into Court in the manner prescribed by law, and that the curator *ad hoc* could not, in any way, *waive* his rights.

See also 5 An. 500, Glacours vs. Lane; 28 An. 259, Ticknor vs. Calhoun; 33 An. 212; Bienvenue vs. Insurance Co.; 38 An. 1168, Cormer vs. Valcourt, to the same purport.

In case cited in 28 An. 257, the Court said:

"The curator *ad hoc* filed an answer and exception and after trial and judgment it was discovered that no evidence of the citation of the absentee had been made. . . . . The curator *ad hoc* cannot, directly or indirectly, *waive citation.*"

The answers of Cobb and Green, therefore, could not cure want of citation of the absentee.

Article 3547, Civil Code, provides the mode for reviving judgments, "by having a *citation issued*, according to law, *to the* DEFENDANT OR HIS REPRESENTATIVE . . . . and if such defendant be absent, and not represented, the Court may appoint a curator *ad hoc* to represent him in the proceedings, *upon which curator ad hoc the citation* SHALL BE SERVED."

It is the *service of citation alone* which interrupts the prescription.

Besides, this was not a proper case for the appointment of a curator *ad hoc*. The defendant had died long before in the State of Tennessee, and neither *she* nor *her heirs* owned any property in Louisiana, and this suit is not *in rem*, but is a personal action to revive a personal judgment.

The Supreme Court of Louisiana, in Bracey vs. Calderwood, said:

"This suit is not *in rem*. It is a personal action. The record does not show that the absentees own any property in

this State which was subject to the process of this Court; or that any citation was actually served on them; or that they have joined issue in person or by attorney. In the recently decided case of Laughlin vs. L. & N. O. Ice Co. we held that it is now the settled jurisprudence of the Supreme Court of the United States that, except in actions affecting the personal *status*, or in those partaking of the nature of proceedings *in rem*, like suits to partition real estate, foreclose mortgages, or enforce privileges and liens, substituted service, as against a non-resident, can be effectual, as '*due process of law*,' under the fourteenth amendment of the Constitution of the United States, *only when in connection therewith property in the State is brought under the control of the Court and subjected to its disposition by process* adapted to the purpose. The question being *federal* in its nature, former jurisprudence of this Court must yield to the authority of the highest court of the country."—36 An. 797.

If the Act of 1853, re-enacted in 1870, and incorporated in Article 3547 of the Civil Code, *intended* to authorize citizens of Louisiana to sue non-resident defendants, who did not own property in this State, by substituted service, the law in that particular is null and void, because it is in contravention of the Fourteenth Amendment of the Constitution of the United States.

Was Austin Green, Clerk of the District Court, the legal "representative" of Mrs. E. W. Warfield, the judgment debtor? The supposition is preposterous.

She had permanently removed from the State two years before her death; she did not own any property in Ouachita Parish or in Louisiana when she died; and she died in the State of Tennessee.

The Civil Code, Art. 934, declares that the place of the opening of succession is fixed as follows:

"In the Parish where the deceased resided, if he had a fixed domicile or residence in the State.

"In the Parish where the deceased owned immovable property, if he had neither domicile nor residence in the State or in the Parish in which it appears by the inventory, his principal effects are, if he had effects in different Parishes.

"In the Parish in which deceased has died, if he had no fixed residence, nor any immovable effects within the State at the time of his death."

The Courts of Louisiana, therefore, had no jurisdiction over Mrs. Warfield's succession, which was in the State of Tennessee.

But if she had had property in Ouachita Parish, or had died there, the Clerk of the Court, as such, could not have been appointed, as he was without an application and publication, or notice of the application, inventory or bond. The law under which this appointment was made was repealed long ago.

The Section 3691 of Revised Statutes of 1870 (Act of 1853), authorizing Clerks of Court to assume the administration of estates under $500.00, in certain cases, was repealed by Section 9 of the Act of 5th of March, 1870, No. 87, page 120, of Acts of 1870, creating public administrators. See 25 An., 217, Succession of Winn.

Act of 1870, page 80, No. 40, gives precedence in authority to Acts passed at that session over everything in the Revised Statutes or Civil Code or Code of Practice, in conflict with any Act passed at that session.

Section 3691 of Revised Statutes of La., page 716, reads as follows:

"Whenever it shall be found by the Clerk that a succession is so small, or so much in debt, that no person will apply for or is willing to accept the curatorship, or when a vacancy exists

in such appointment to which no one demands the nomination, the Clerk shall assume the administration of such succession. He shall cause its effects to be sold, and the proceeds to be applied to the payment of its debts, the whole to be done in as summary a manner as possible to diminish costs; Provided, that this section is not to apply to successions amounting to more than $500.00.

Act No. 50, page 80, of the Act of 1870 of the Legislature of La., gives precedence in authority to Acts passed at that session over everything in the Revised Statutes or Civil Code or Code of Practice in conflict with any Act passed at that session. It is as follows:

"That the Acts and joint resolutions passed during the present session of the General Assembly, which may be contrary to or in any manner conflict with the Acts of the present session, known as the revision of the general character, and of the Civil Code or Code of Practice, shall have precedence of said revisions and be held as the law in opposition thereto, and as repealing those Acts, so far as they may be in opposition or conflict."

The Act of 1870, No. 87, page 120, is as follows:

"Sec. 1. That the Governor of the State of Louisiana shall appoint a suitable person to be known as Public Administrator, for each and every Parish in the State, whose duties and powers shall be as follows: In all intestate successions, where there is no surviving husband or wife, or heir, present or represented in the State, the Public Administrator of the Parish shall be appointed by the Judge of the proper Court to administer the same."

"Sec. 4. That all vacant successions shall be administered by the Public Administrator of the Parish in which the deceased died, until the heirs present themselves and are recognized by the Court and put in possession; and if no heirs present themselves within one year, the funds resulting from such estate shall be paid into the treasury of the State."

"Sec 9. That all laws on the same subject matter inconsistent with this law are hereby repealed."

The office of Public Administrator was abolished by Sec. 1 of Art. No. 74, of the Acts of 1877, and it provides as follows:

"Sec. 1. That the office of Public Administrator, created by Act No. 87 of the General Assembly, approved 5th March, 1870 . . . be and the same is hereby abolished in every Parish of the State of Louisiana, except in the Parish of Orleans; and that hereafter all successions opened in said Parishes, outside of the Parish of Orleans, shall be administered upon by persons selected, appointed and confirmed under and in conformity with the Articles of the Civil Code and Code of Practice relating to the subject matter of successions and the administration thereof."

Art. 1190 of the Revised Civil Code says:

"If a succession is so small, or is so much in debt, that no one will accept the curatorship of it, the Judge of the place where the succession is opened, after having ordered an inventory of the effects composing it, shall appoint the District Attorney of the District, or the attorney *pro tempore* of the Parish, curator of said succession, who shall cause the effects to be sold," etc., etc.

Both must be appointed by the Court on the petition of the applicant—C. C. 1115, 1116, 1117—and there must be an inventory (C. C. 1104), and he must take an oath and give bond (C. C. 1126).

And "all actions, which could have been brought against the deceased, must be commenced, cumulated and prosecuted before the Judge of the place where the succession is opened, and brought against the curator appointed by the Judge, as is hereinafter prescribed." C. C. 1113; C. P. 122.

Therefore, the appointment of Austin Green, Clerk of the District Court, administrator of Mrs. Warfield, was a nullity.

It is manifest, therefore, that neither Mrs. Warfield nor her heirs have been cited in the suit to revive the judgment, and that the judgment is preseribed and extinguished.

Nor did the hypothecary action against the 3d possessor interrupt prescription.

This is well settled. "A citation in a suit to revive a judgment would not interrupt the prescription of the judgment." 4 An. 509, Jacobs vs. Calderwood; 31 An. 396, Chapman, Ex. vs. Citizens Bank.

"L'interruption de la préscription de l'hypothèque n'interroupt pas la préscription de l'action personelle." *Trolang, Hypothèques, 4, 878, bis.*

"Sarsque l'immenble hypothèque est passé dans les mains d'un tiers détenteur, les actes d'interruption de l'action personelle contre le débiteur n'interroupt pas la prescription à l'egard du tiers détenteur; réciproquement, l'interruption de l'action hypothècaire n'interroupt pas la préscription de l'action principale." *Trolang, Préscription, 2 No. 659.*

Suppose Mrs. Warfield, the bankrupt, who never got her discharge, were living, and had a large fortune in Tennessee, could the judgment of Chaffe vs. E. W. Warfield be enforced against her, under the pretext that it had been revived by citing Atkins, assignee, or by Cobb, curator *ad hoc waiving citation?*

Can said judgment be now enforced against her heirs, William Fitz, in Mississippi, or Mrs. Strother, in Missouri?

Certainly not.

The laws of Louisiana declared the judgment prescribed or extinguished ten years after its date, unless revived *by citing*, in the Court which rendered the judgment, within the ten years, "the defendant or his representative"—and that has not been done.

The Court which rendered the judgment of renewal was without jurisdiction, *ratione personnae*. Mrs. Warfield lived

and died outside of the State, and her representatives were also non-residents. It is therefore an absolute nullity.

"Jurisdiction is acquired in one of two modes; first, as against the *person* of the defendant by the service of process; or secondly, by a procedure against the property of the defendant within the jurisdiction of the Court." Boswell, Lessee, vs. Otis, 9 How., 336; Cooper vs. Reynolds, 10 Wallace, 308.

There was no service of process on the defendant nor had she any property in the State.

In *Pennoyer vs. Neff, 95 U. S. Reports*, page 727, this Court said:

"But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, *where the suit is merely in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose."

In the same case the Court said:

"The whole subject has been very fully and learnedly considered in the recent case of Thompson vs. Whitman, 18 Wall., 457, where all the authorities are carefully reviewed and distinguished, and the conclusion above stated is not only reaffirmed, but the doctrine is asserted that the record of a judgment rendered in another State may be contradicted, as to the facts necessary to give the Court jurisdiction, against its recital of their existence. In all of the cases brought in the State and Federal Courts, where attempts have been made, under the Act of Congress, to give effect in one State to personal judgments rendered in another State against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception, so far as we are aware, that such judgments were without any binding force, except as to the property, or interest in the property, within the State, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the Court, in connection with the process against the person." Page 730.

Again, on page 732, of said opinion, the Court said:

"In later cases this language is repeated with less pregnancy than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any State of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered. Be that as it may, the Courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the State Courts, they are tribunals of a different sovereignty, exercising a distinct and different jurisdiction; and are bound to give the judgments of the State Courts only the same faith and credit which the Courts of another State are bound to give to them."

"As stated by Cooley, in his Treatise on Constitutional Limitations, 405, FOR ANY OTHER PURPOSE than to subject the property of a non-resident to a valid claim against him in the State, *due process of law would require appearance or personal service* before the defendant could be personally bound by any judgment rendered." . . . "It follows from the views expressed that the personal judgment recorded in the State Court of Oregon against the plaintiff herein, then a non-resident of the State, was without any validity, and did not authorize the sale of the property in controversy."

Pennoyer vs. Neff, page 734.

Plaintiff contends that J. and C. Chaffe's claim is inequitable and unconscionable; that by gross abuse of their right, they caused to be sacrificed the entire estate of Mrs. Warfield, proved to have been worth upwards of $25,000.00. All of which property they acquired greatly to the detriment of other creditors, and to the injury of the plaintiff in error, if his property is to be subjected to their alleged judicial mortgage.

The motive of said Chaffes in forcing the sheriff to make the sale of "Bon Air" plantation, under the executions issued in the cases of Mittenberger and Merrill, Bryne and Shields and

L. D. McLain, Ex. vs. E. M. Warfield, is manifest. Under those executions the property was advertised for sale for *cash, without the benefit of appraisement*, under confessions of judgment, made by insolvent debtor, waiving appraisement (see testimony of Judge Ray). And having a judicial mortgage on said plantation, ranking next after the above mentioned judgments, no one was likely to attend the sale to bid; particularly under the circumstances then existing, already mentioned in relation to this property and its sale. Of course they bought the property. The price bid was a little over the amounts of said judgments and costs—$3375.00.

No part of the price bid was paid to the sheriff. R. p. 78.

No returns were made by the sheriff. R. p. 59–60.

Under the law, property at sheriff's sale must bring two-thirds of its appraised value, in order to sell.

Code of Practice, Art. 680, declares,

"These previous steps being taken, the sheriff shall proceed to the sale and adjudication of the property taken. *and if the price offered by the highest and last bidder does not reach two-thirds of the appraisement on it*, as directed above, (Articles 671, 672, 673, Code of Practice,) *then the thing shall not be adjudged*, and the sale shall be postponed for fifteen days if it be immovable property, and ten days if it be movable, counting from the fresh notice which shall be given by the sheriff, in the manner hereafter directed." *3 An. 390, 9 Rob. 531.*

By forcing the sale under the before-mentioned executions, they knew there would be no competition, and that they would thus be able to buy the property for much less than they could if it sold under their judgment and according to law.

Had the property been sold at two-thirds of its appraisement it would have realized enough to pay all the executions and the

judgment of J. and C. Chaffe. The property is proved to have been worth ten thousand when it was sold in 1876. See testimony of Sanders, R. p. 61, and of Miller, R. p. 63.

Parties cannot, by their agreement or consent, create twelve-months' bonds, or authorize judicial sales different from the manner provided by law.

In 30 Am., p. 271, the Court said :

"A judgment is rendered and in execution thereof a writ of *fi. fa.* issues, property is seized and sold for cash or on a twelve months' credit. In the latter case a bond is given, and, if not paid, *another writ* issues in execution. *The public interest* demands that those essential forms be complied with." . . . . . "Grave and important consequences attach to and follow the enforced alienation of property, and in many instances the rights of third persons are directly or indirectly affected thereby. Thus a forced alienation, under a first mortgage, divests the property of a subsequent or junior mortgage. What security would there be to such subsequent mortgages, if, by a private agreement between the debtor aud the holder of the first mortgage, such a bond as that in this case could authorize the seizure and sale, without appraisement of the property? The law prescribes certain essentials for the existence of both (twelve months bonds and authentic acts,) and there is no reason for saying that parties can give a private agreement the force and effect of law." 30 An. 1271.

Mrs. Warfield was in failing circumstances when she gave the confessions, and was actually a declared bankrupt when the sale was made in September, 1876. She could not, therefore, have waived the appraisement of her property. *1 An. 297, Lawrence vs. Young; 1 An. 340, Suc. of Heliberg; 2 An. 416, Union Bank vs. Bradford; 3 An. 390; Code of Practice, Arts. 671, 676, 680.*

The evidence shows that the thing which was offered for sale by the Deputy Sheriff, Woods, was not what had been ad-

vertised for sale, but *only such interest* in the property *as Mrs. Warfield had in it on that day.* She had made a voluntary surrender of her property before this date, consequently she had no interest in the property, which was vested in the *assignee. Bankrupt Law, Section 5044, Bump, p. 480.*

The Deputy Sheriff had made the sale in this way on the advice of Mr. Garrett, given to the principal Deputy, in consequence of the service of the certificate of protection issued by the Register in Bankruptcy and served on Hamlet, Sheriff.—*Bump, p. 858, V.*

In McMicken vs. Bradford, Judge Porter said:

"Forced alienations of property must be in strict pursuance of law; and *seizing one thing and selling another does not divest the debtor of that which was seized.*" 1 La. 16.

The evidence on this point is the testimony of Whited, Deputy Sheriff, and the bondsman of the Sheriff, who says that in consequence of receiving the certificate of protection issued in Mrs. Warfield's bankruptcy, he consulted the Sheriff's legal adviser, Mr. Garrett, who advised him only to sell whatever interest Mrs. Warfield had in the property on that day; that he was present at the sale and *only such interest as Mrs. Warfield had in the property on that day was offered for sale and adjudicated.*

Woods, who officiated at the sale, testifies to the same thing.

Franklin Garrett corroborates these witnesses. He says he was consulted by Whited; that he advised him to sell only such interest as Mrs. Warfield had on that day, and impressed it on the principal deputy to be sure not to sign, or permit to be signed, any act without first submitting it to him in order that he could see if the act correctly stated what was sold; and that the deed was not submitted to him. R. p. 58.

Wood and Whited explain why it was not, which was that the deputy, Wood, had been made to sign, through fear of personal violence, the act prepared by C. A. Morrison, the attorney for Chaffe.

The deed was signed at night, out in the country, without reading it, and under circumstances calculated to alarm the deputy, a negro, and it misrepresented the thing which had been offered for sale and adjudicated. No sheriff's return of the sale was ever made.

Whited swears that Mr. Morrison, the attorney of Chaffe, threatened to sue him if the sale was not made.

What right had the attorney of Chaffe to insist on the sale?

One of the Chaffes was present and bid at the sale. The sale was advertised for cash *without appraisement*. Hence the anxiety of Chaffe and his attorney to have it made.

The deed was prepared by Chaffe's attorney, *mis-stating the thing that was sold*, and he, Chaffe, insisted upon having the deed signed that night, under the pretext that *he* wanted to leave for New Orleans in the morning. What necessity was there for the signing of the deed *that night* before Chaffe left? Chaffe and Morrison being present knew, what was notorious and plain to be seen, that there was great excitement in the neighborhood of Monroe, and that the Deputy Sheriff, Wood, a negro, would be intimidated if any white men followed him to the country, whither he had gone, and demanded or "politely requested" him to sign that deed, and that he would sign it whatever it might contain.

The presumption is clear that they thus intended to obtain a written act from the Deputy Sheriff containing a false description of what had been sold, in order to derive an advantage over others.

They did not pay the price bid to the Sheriff, yet the act represented that the price was appropriated by the Sheriff to

the payment of the writs in his hands and costs, leaving $95.10 to be credited on Chaffe's judgment; and the deed represents that the land advertised was sold, whereas only *such interest* as Mrs. Warfield had in said lands on the day of sale (after her assignment in bankruptcy) was offered for sale.

And three years after the sale of "Bon Air," under a decree evidently obtained by consent and collusion, the remainder of Mrs. Warfield's estate, proved to have been worth between ten and fifteen thousand dollars, was bought by Chaffe at a public sale, *without appraisement*, for less than $2000.

Thus it appears that to pay a judgment for less than $3000 and interest, rendered in 1874, property worth between $18,000 and $30,000, was sacrificed, under *consent decrees*, at sales *without appraisement;* all of which was acquired by the judgment creditors, J. and C. Chaffe.

And still said J. and C. Chaffe claim that there is due on said judgment over five thousand dollars, which they are now seeking to collect by the sale of "Oak Grove," acquired by Dr. Dinkgrave from Mrs. Warfield in 1875, by his paying as the price of "Oak Grove," her back taxes, which, with the interest and penalties, then amounted to over $4000, and which were, until paid by Dinkgrave, a lien and privilege upon all of the real estate of Mrs. Warfield, subsequently acquired by J. and C. Chaffe as aforesaid.

Besides thus acquiring this property they remitted the rents of the dwelling-house ($850), paid the fee of the attorney for Mrs. Warfield and Mrs. Strother ($250), out of proceeds of preperty sold, and remitted or failed to collect the rents of "Bon Air" (if it was seized,) $2200.

The attention of the Court is particularly called to the decision in *37 An. 757, Templeton vs. Hamilton & Co.* The Court said:

"Counsel contend that it is absolute and unconditional that Templeton became the perfect owner of the entire mortgage, with right of use and abuse. . . . . This contention has not the slightest foundation in law or in justice. The whole object and effect of the mortgage was to secure payment of the principal debt due on the notes. . . . . "

The Court then quotes Trolong as saying:

"It is essential that the insolvency should not have been occasioned by the act of the transferee. If, for example, the transferee has gratuitously released the mortgage which secured the debt, if he has consented to release some of the securities, or one of the solidary debtors, he will not be heard to complain that the debt has become bad, because it was himself who had caused it."

"He then," say the Court, "proceeds to show that a like result attaches when securities have been lost or impaired through the mere negligence of the transferee. . . . . Applying these principles to the facts heretofore minutely detailed, let us enquire, *through whose fault was it* that the 1143 acres remaining validly mortgaged and shown by competent testimony to be worth nearly double the entire mortgage resting on them, failed to satisfy Templeton's debt. . . . . But even passing this by, it is at least clear that in proceeding as he did without notice to Hamilton & Co., he *incurred the highest duty* to act in strict conformity to law and to do *all in his power to make the property bring its full value.* . . . . . A sale made under such agreements has no claim to the effect of a judicial sale in fixing the value of the property. . . . . The evidence in this case establishes, as we have seen, that the land was worth much more than enough to satisfy all the mortgages on it, *and hence there is no ground for the claim herein.*

"We might present other considerations showing that Templeton has *actually* realized in execution of his various agreements with Cash an amount very nearly equal to the whole amount of his claim, as the direct result of his ownership thereof."

Through whose fault was it that the valuable estate of Mrs. Warfield, shown to be worth many times more than Chaffes' debt, "failed to satisfy their debt"?

Manifestly through Chaffes' fault, by forcing the sale of property under *consent decrees*, for cash *without appraisements* and without legal advertisements, and by releasing the rents due for the property, etc. Instead of acting "in strict conformity to law," and doing "all in his power to make the property bring its full value," as the Court said it was their "highest duty" to do, they sacrificed it, and bought it at a mere nominal price, and the evidence in this Record shows that the Chaffes have actually realized much more than the amount of their debt from the sales of the property of Mrs. Warfield. R. pp. 84, 85. See also 30 An. 1347.

The evidence shows that Chaffe sold "Bon Air" for $5,600, and the house in Monroe for $2500 to Geo. McEnery, who sold it for $5000, to say nothing of the other property bought by them.

It is submitted, therefore, that under these just and equitable principles, J. & C. Chaffe should not be permitted to seize and sell the property of the plaintiff in this suit, after having so used this right, under *consent judgments and arrangements* with those representing their debtor and in palpable violation of the laws of Louisiana in reference to judicial sales, as to acquire the whole estate of their debtor for a comparatively paltry price, after releasing and giving away other assets of their debtor, to the injury of the third possessor.

It is a familiar rule in equity that no one should be permitted to so use his right as to destroy the rights of others. 24 Howard, 262.

There was *no seizure* of the "Bon Air" plantation, because there was no valid writ in the hands of the sheriff when the

sale was made. The writs had been issued on the 17th day of February, 1875. They had to be returned within 70 days under the law.

The Code of Practice, Art. 642, commands the Sheriff, if he is unable to make the sale before the return day, to "nevertheless make due return of the writ; but at the time of making such return, he shall make and retain a copy of the writ, duly certified by himself, and it shall be his duty to proceed under such certified copy," etc.

This was not done.

It appears that on the 16th of August, 1876, more than a year after the writ had expired on his hands, the officer made copies thereof.

"As the seizure must be by virtue of an execution, it is evident *it cannot be made after the return day.*" Bouvier, verbo, "Seizure."

A sheriff's authority is derived from the writ in his hands; when it expires the writ expires. *Rothschild vs. Ramsey, 2 La. 277; 11 Rob. 49; 30 An. 87.*

In the case last quoted the Court said:

"The *fieri facias* in her case, that of the New Orleans National Bank vs. Jos. Raymond, was dated Sept. 2d, 1876, and levied on September 4th, 1876, and had expired on November 15th, 1876, the date at which the plaintiff's seizure and sale was made, *unless it was kept alive* by the demand by the sheriff from the clerk of a copy in accordance with the provisions for the Prish of Orleans, contained in Art. 642 of the Code of Practice. By that Article, *in all cases*, when a seizure is made under *fieri facias*, except in the Parish of Orleans, the duty of the sheriff to return the original writ on its return day, and to make and retain a duly certified copy of the writ, and to proceed under said certified copy in the same manner as though the original writ was in his hands; and to make due return thereon.—We have been unable to find any such copy, or any copy at all

of Mrs. Baranco's writ, or of any return upon it in the record. So far as this record discloses the facts, the sheriff had no process—nothing under which "to proceed"—on her behalf upon her judgment. . . . . He was, therefore, without either power or authority to proceed for either purpose after that time."—30 An. 88.

There was no seizure, even if there had been an execution. To make a valid seizure of tangible property, the thing must be taken in *actual possession.*

"When the sheriff seizes houses or lands, *he must take,* at the same time, *all the rents, issues and revenues* which the property may yield." C. P. 656.

If it be land or a plantation which he has taken, unless the same has been leased or rented, it shall remain sequestered in his custody until the sale. Consequently he may appoint a keeper, or an overseer to manage it, for whom he shall be responsible. *C. P. 657; 6 R. 102; Winn vs. Elgee, and Gaubeau vs. The N. O. & N. R. R. Co. 6 R. 345.*

In the latter case the Court asks:

"Now what is seizure? Bouvier's Dictionary, vol. 2, says: 'Seizure is defined to be the act of taking possession of the property of a person, condemned by the judgment of a competent tribunal to pay a certain sum of money, by a sheriff or other officer lawfully authorized thereto, by virtue of an execution, for the purpose of an execution, for the purpose of having such property sold according to law, to satisfy the judgment.'

"There must be, therefore, *an act of taking possession* of the property; the thing seized must be put in the hands of the officer, otherwise the seizure is incomplete, or rather, *there is no seizure.*" 6 Rob. 347; 2 An, 784.

In *6 An. 584, Stocklang vs. Downey,* Judge Eustis says:

"By the return it does not appear that any seizure of the lots was made or even attempted. *No notice to attorn* was given to the tenants; no *act of possession or custody* was done in

relation to the property by the sheriff, or any one for him. . . . We have held in several cases, that to make a valid seizure of tangible property under a *fieri facias*, the thing levied upon must be taken possession of by the officer." 2 An. 338, 492, 785, 910; 4 An. 371. "We therefore conclude that the proceedings under the writ of attachment, in relation to these lots constituted no impediment whatever to their being sold at the instance of the mortgage creditor, and that the plaintiff has no right, by reason of the attachment, to call in question the validity of the title under which defendant claims."

In the same case the Court said of the sheriff's return:

"It must state the facts truly, and must not be argumentative. A return in which the sheriff stated his opinion of the law of a constructive custody, was quashed and not allowed to be amended." Lowell vs. Sheriff, 584.

The proof that there was no possession taken by the officers or any of them, is beyond question. Wood testifies that Hamlet had the writs and made whatever seizure there was in town where Mrs. Warfield resided. He testifies that he was sent out to "Bon Air" *without any writ*, and that he made the seizure by appointing one *Craig*, keeper; that he never disturbed the possession of the lessees on the place; never notified them of the seizure, nor took the rents and revenues.

But there is abundant proof without this witness.

Calhoun, Barker and Woodward were lessees from Mrs. Warfield of the "Bon Air" plantation in 1875, when, it is alleged, the seizures were made.

Calhoun and Barker testified in this case, that they were never disturbed in their possession of "Bon Air" in 1875; that they were never notified of any seizure; that the rents were not seized, and that they paid the rents to Mrs. Warfield. R. p. 80. They further testified that they leased the plantation from Mrs. Warfield in 1876. R. p. 80.

They testified that a *tenant* or *employee* of Calhoun, by the name of Craig, was on "Bon Air" a part of the year 1875, that he left the place in the summer or fall, and has never been back, and that he never interfered with the lessees' possession.

Woodward, the other lessee, is dead. His testimony was taken in a suit in the U. S. District Court, in a controversy between Mrs. Warfield's assignee and the Chaffes, who cross-examined him.

Judge W. J. Q. Baker's testimony was taken in the same case.

They prove the same facts that Calhoun and Parker prove in regard to the possession of "Bon Air." Woodward testified that he leased and cultivated part of "Bon Air" in 1875 and 1876, without any disturbance of his possession, or notice of seizure of any kind, and that he paid his rents for both years to Mrs. Warfield.

All the lessees say they never saw the sheriff or any of his deputies on "Bon Air" in 1875, and that they never heard of any seizure until the sale in 1876.

No notice was given to the tenants to attorn; no act of possession or custody was done in relation to the property by the sheriff.

Baker and Strother also swear positively that no possession of "Bon Air" was ever taken by the sheriff in 1875.

It was the duty of the sheriff, if he made a seizure, to take the rents. C. P. 656; 30 An. 88. He could not appoint a keeper. C. P. 657.

The seizure is essential, and its illegality cannot be cured. A purchaser at a sheriff's sale, made without previous seizure, acquires nothing. 2 An. 785, 910; 3 La. 422; 10 Rob. 30.

"The citizen can only be deprived of his property in two ways—by his own consent, or by a forced alienation under the authority of the law. The latter mode of transferring property

derives all its efficacy from a strict pursuance of the formalities which that law prescribed. Where, then, these are wanting, there is not the alienation by law which can alone supply the want of consent by the owner." 3 La. 241, 242.

The judgments under which the writs issued were extinguished by the rents of "Bon Air," if any seizure were made, as the sheriff was bound to "take the rents." C. P. 656; 17 La. 274; 30 An. 88, 436; 33 An. 1047.

"Bon Air" plantation, not being under seizure in 1876, when Mrs. Warfield made her assignment to Atkins, assignee, the title thereto vested in the assignee, and the alleged sale to Chaffe, after Mrs. Warfield's surrender, was a nullity.

The assignee could not be ousted of his possession and title in the manner attempted by the defendants in error; and the amicable arrangements or transactions between J. & C. Chaffe, the assignee, Mrs. Warfield and Mrs. Strother, do not conclude or bind the plaintiff in error, whose right to Oak Grove antedates the surrender and all these transactions.

The plaintiff in error, *third possessor*, therefore claims the right to require the mortgage creditors to proceed against "Bon Air" plantation, the property of the assignee, or of Mrs. Warfield, as well as against the other property of Mrs. Warfield alienated subsequent to her sale of "Oak Grove" to Dr. Dinkgrave, in June, 1875, before attacking "Oak Grove," under the law and jurisprudence of Louisiana.

The third possessor has the right to show that the mortgage is a *nullity*, or *extinguished*. 19 La. 478.

This he has already shown by proving that the judgment was not legally revived within ten years from its rendition, by *citation of the defendant or her representative*.

The third possessor also has the right to point out property

in the possession of Mrs. Warfield, or her assignee, or property sold subsequently to that in his possession.

Article 715 of the Code of Practice declares—

"The purchaser against whom a suit is commenced by a creditor having a legal and judicial mortgage on the property of the debtor sued, may require the creditor to discuss the other property which he has in his possession, and even that which he has alienated since the purchase, *because the creditor who has a general mortgage can only act against the property of which his debtor has disposed, in the order in which the alienations have been made, beginning at the most recent and ascending to the most ancient.*"

It is submitted that Article 715 of the Code of Practice (which embodies the Act of 1817,) not only gives the right to the *third possessor* to require the holder of a legal or judicial mortgage to proceed against the other property of the judgment debtor, or that which he has alienated since the purchase, but it *expreesly declares* (as had before the Act of 1817,) that "the creditor who has a general mortgage can only act against the property of which this debtor has disposed, in the order *in which the alienations have been made, beginning at the most recent and ascending to the most ancient.*"

It is a positive command to the holder of a general mortgage how, *and how only*, he shall proceed. That law forms a part of every contract, or obligation, or judgment, creating a general mortgage; and the third possessor of property subject to a general mortgage acquires it with that stipulation of the law impliedly incorporated in his title. Either this, or the last clause or sentence of the article is meaningless.

In *Jackson vs. Williams, 12 M., 349,* Judge Martin, as the organ of the Court, held:

"But where a debtor, whose property is subject to a general or tacit mortgage, has *successively* sold several objects of real

property or slaves, the *creditor must bring his action against the purchasers, according to the order of their purchases respectively, beginning at the last, and ascending in succession to the oldest.*" Acts of 1817, p. 40, § 29.

In *Patin et als. vs. Brejeau et als. 7 La. 301*, the Court, after quoting the first part of Article 715 C. P., said:

"Had the legislator gone no further it might be urged on the one side that he intended only a special provision, confined to the cases of purchase at the sheriff's sales, and on the other side, that it being difficult to discover why a different rule should be established in regard to such sales, it might be safely concluded that the reason extended to every sale, all should be regulated in the same manner. But the legislator proceeds *and gives us the grounds* on which he acts; *because* the creditor who has a general mortgage can only act against the property which his debtor has disposed of *in the order in which the alienations have taken place*, beginning at the most recent and ascending to the most ancient. If the rule of practice in this respect, established by the Act of 1817, and invoked by the defendants, was repealed as a rule anterior to the Code of Practice, *still the principle is recognized in that Code that the creditor with a general mortgage must proceed against the property alienated by the debtor, by beginning at the most recently disposed of and ascending towards that first alienated until his claim is satisfied.*"

In *Vanhille vs. Her Husband, 5 Rob. 496*, this principle was again recognized. The Court said:

"She (the wife and mortgage creditor) cannot claim the proceeds of the sale of property sold at the suit of one of her husband's creditors, or exercise her action of mortgage against the property in the hands of a third possessor, *if there be any other property subject to her lien in the possession of her husband or sold since, which he is bound to discuss.*"

In *Young vs. Carl, 6 An. 415*, the Court said:

"The plaintiffs claim the value of ten slaves, alleged to have

been sold by the defendant, and forming a part of the succession of Hook. There is no evidence of the value of the slaves, nor of the time at which they were sold. *If* they were alienated *after* the sale of the McMaster tract took place, they must be subjected to the legal mortgage of the plaintiff, before the McMaster tract can be reached."

It is submitted that the Supreme Court of the State could not have arrived at the conclusion they did in this case, without deciding that under the bankrupt act, the *assignee* was the *representative of a bankrupt not discharged* in a suit to recover a sum of money on a personal claim against him,

If so illogical a construction of the said act of Congress were possible, then it is submitted that the limitation of two years, within which the suit might be brought, had long expired before the institution of this suit.

Atkins was appointed assignee in 1876; this suit was filed on February 9th, 1884—*eight* years after his appointment.

The cause of action accrued in March, 1874.

It is submitted that this limitation of the statute is not simply *prescription*, but it is a *prohibition*. *Bump's Bankruptcy, p. 551, § 5057.*

It is quite certain that under that section of the bankrupt act, the suit of Chaffe against Atkins, assignee, to revive the judgment is prohibited. The section says:

"No suit . . . . shall be maintainable in any court, between an assignee in bankruptcy and a person claiming an adverse interest, ... unless brought within two years from the time when the cause of action accrued for or against such assignee."

The plaintiff in error claimed the right to be protected in his property under that section of the bankrupt act, but the State Court denied it him.

It is, therefore, submitted that the judgment of the State Court should be reversed and the case should be remanded, with instructions that the injunction be made perpetual, and that the damages claimed and proved should be awarded against the defendants in error, *in solido*, with all costs.

Very respectfully submitted.

JOHN T. LUDELING, *pro se*.

SHERMAN HARTWELL HUBBARD.

JAN 4 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

October Term, 1891.

MARIA COPLEY LUDELING,
FOR HERSELF AS UNIVERSAL LEGATEE,
AND AS EXECUTRIX OF
JOHN T LUDELING, Deceased,
Appellant,
vs.
JOHN CHAFFE, CHAS. CHAFFE,
J. E. McGUIRE, Sheriff, and
AUSTIN GREEN, Clerk, &c.,
Appellees.

No. 178.

Special Brief in behalf of Appellant upon the questions of Jurisdiction and Prescription.

SHERMAN HARTWELL HUBBARD,
of Counsel.

It is, therefore, submitted that the judgment of the State Court should be reversed and the case should be remanded, with instructions that the injunction be made perpetual, and that the damages claimed and proved should be awarded against the defendants in error, *in solido*, with all costs.

Very respectfully submitted.

JOHN T. LUDELING, *pro se.*

SHERMAN HARTWELL HUBBARD.

FILED.
JAN 4 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

October Term, 1891.

MARIA COPLEY LUDELING,
FOR HERSELF AS UNIVERSAL LEGATEE,
AND AS EXECUTRIX OF
JOHN T LUDELING, Deceased,
Appellant,
vs.
JOHN CHAFFE, CHAS. CHAFFE,
J. E. McGUIRE, Sheriff, and
AUSTIN GREEN, Clerk, &c.,
Appellees.

No. 178.

Special Brief in behalf of Appellant upon the questions of Jurisdiction and Prescription.

SHERMAN HARTWELL HUBBARD,
of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1891.

MARIA COPLEY LUDELING,
FOR HERSELF AS UNIVERSAL LEGATEE,
AND AS EXECUTRIX OF
JOHN T. LUDELING, Deceased,
Appellant,

vs.

J. AND C. CHAFFE, ET AL.,
Appellees.

No. 178.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Supreme Court of the State of Louisiana affirming the judgment of the District Court for the Fifth District of Louisiana, Parish of Ouachita, and denying to appellant an injunction to restrain the sale of certain property belonging to him and about to be sold at sheriff's sale.

The property in question consists of about 430 acres of land in the Parish of Ouachita and State of Louisiana. This land was originally the property of one Mrs. E. W. Warfield. While still in her possession, J. and C. Chaffe, on March 20th, 1874, obtained a personal judgment against the said Warfield for the sum of $5000, subject to a credit of $2327, which judgment became, under the law of Louisiana, a legal mortgage against all her property. In 1875 this land, known as "Oak Grove Plantation," was seized by certain judgment creditors of Mrs. Warfield, together with a certain other plantation of hers known as "Bon Air." After the seizure, and by agreement between B.

W. Richardson, attorney for the judgment creditors, Dr. B. H. Dinkgrave and Mrs. Warfield, Oak Grove was transferred on the 30th of June, 1875, from Mrs. Warfield to Dr. Dinkgrave. The consideration for this sale was the payment by Dr. Dinkgrave of the State and Parish taxes then due and owing by Mrs. Warfield, amounting to $3782.36, and constituting a first lien upon all her property. (Record, page 103.)

In 1876, Mrs. E. W. Warfield made an assignment in bankruptcy to William T. Atkins, who thereby came into possession of the plantation Bon Air and certain other property specified in Schedule B, (Record, page 122.) This assignment was made on the 1st day of September, 1876, under U. S. Bankrupt Law of 1867.

After the death of B. H. Dinkgrave in 1876, Oak Grove was sold by his succession to John T. Ludeling, appellant in the present suit, for the consideration of some $2500.

Atkins, the assignee of Mrs. Warfield, under the United States bankrupt law of 1867, administered the estate, disposed of the property in his hands, and filed his account in the Clerk's office of the United States District Court for the Eastern District of Louisiana, on the 15th of October, 1879. This account (Record, page 120,) was a final account. It disposed of the whole matter and entitled Mrs. Warfield to be discharged, but she never made application for such discharge. On November 16, 1881, a rule was entered requiring her to show cause why discharge should not be refused for want of seasonable application therefor.

In 1879, Mrs. Warfield removed from the State of Louisiana to the State of Tennessee. She died there in 1882. (Record, page 49.) She had no property in the Parish of Ouachita at the time of her removal. (Record, pages 44, 45, testimony of Richardson; page 49, testimony of J. T. Ludeling.)

Mrs. Warfield's succession comprised her grand-daughter Eliza Strother, wife of Dr. Strother, who lived in Tennessee, and a minor child of Mrs. Fitz, another grand-daughter. Mrs. Fitz died before Mrs. Warfield. Mrs. Strother removed to

Tennessee and lived there at the time of Mrs. Warfield's death, Mrs. Fitz died In St. Louis, Missouri. (Record, pages 44, 49.)

In 1884, on the 9th of February, two years after the death of Mrs. Warfield, and several years after the removal of Mrs. Warfield and her heirs from the State of Louisiana, J. and C. Chaffe attempted to revive their judgment against Mrs. Warfield, which had been obtained on the 20th of March, 1874, as aforesaid.

For the purpose of obtaining the required jurisdiction they cited William Atkins on the 9th of February, 1884, (Record, page 109,) claiming him to be the personal representative of Mrs. Warfield. On the same day they procured the appointment of one R. J. Cobb as *curator ad hoc*, to represent the heirs of Mrs. Warfield, who, as above stated, resided respectively in the States of Tennessee and Missouri. Cobb never took the oath required by law to be taken by a *curator ad hoc*. Cobb was never cited, but waived service and citation. (Record, page 109.)

J. and C. Chaffe also procured the appointment of one Austin Green to be administrator of the succession of Mrs. E. W. Warfield. (Record, page 107.) Said Green took the oath as administrator, but he waived service of petition for a revival and of citation. (Record, page 109.) At this time Mrs. Warfield had no property in the State of Louisiana, and the record does not show that either Green or Cobb ever performed any official act, except to sign the waivers, and to file formal answers in the nature of general denials. These answers were filed the 18th of February, 1884. (Record, pages 110, 113.)

An answer was filed in behalf of Atkins, administrator, on the 18th of February, by Potts & Hudson, attorneys, purporting to act for Atkins. Potts subsequently testified (Record, page 41,) that he did not know who employed him. Nevertheless judgment of revival was rendered on the 19th of February, 1884, signed on the 20th of February, and Atkins died on the 21st of February of that year. Upon execution issued subsequent to the revival of the aforesaid judgment against Mrs. E.

W. Warfield, the land of the appellant, Oak Grove, was seized and offered for sale. This sale appellant attempted to enjoin, but the injunction was refused and such refusal was confirmed by the Supreme Court of Louisiana.

JURISDICTION.

This case involves a federal question properly cognizable by this Court, inasmuch as the alleged representative capacity of William Atkins, relied upon, depends entirely upon the construction placed upon the National Bankrupt Law of 1867 by the Louisiana Courts. If the said Bankrupt Law made him the personal representative of the debtor, and continued him in that capacity for an indefinite time after he had rendered his final account and distributed the property, then the judgment of the Court below was correct, if not, then it should be reviewed and reversed by this Court.

"However frivolous the question, if it raise a question under the 25th section of the Judiciary Act, the decision may be revised by this Court upon writ af error."

Hall vs. Judson, 15 Wall. 393.
Gregory vs. McVeigh, 23 Wall.
Tennessee vs. Davis, 10 Otto, 264.
Pennoyer vs. Neff, 5 Otto, 733.
Cooley's Const. Lim. pp. 398, 402, 403, 404, 405.
Chicago Ins. Co. vs. Needles, 113 U. S. 574.

"Where it appears that the title or immunity on which recovery depends, will be defeated by one construction of the Constitution or a law of the United States or sustained by the opposite construction, the case is one arising under the Constitution or laws of the United States."

Starin vs. N. Y. 115 U. S. 248.
Carondelet vs. St. Louis, 1 Black. 179.
Maguire vs. Tyler, 1 Black. 195.

ON THE QUESTIONS OF PRESCRIPTION AND CITATION.

The law of Louisiana provides for the prescription of a personal judgment by lapse of ten years, unless said judgment is revived.

Revised Civil Code, Article 3547.

This judgment has never been revived.

The judgment against Mrs. Warfield was rendered March 20th, 1874. It was prescribed March 20th, 1884, unless the steps taken by the Messrs. Chaffe were competent to revive it.

The aforesaid section of the civil code (3547) defines the method to be followed in reviving such a judgment, and this includes the issue of a citation to the defendant or his representative.

Chapman vs. Nelson, et al, 31 Annual, 342.

We insist that no citation was ever issued to the defendant (Mrs. Warfield,) or any legal representative of hers, and therefore the judgment was not revived and prescription took effect.

Mrs. Warfield was dead. Long prior to her death she had removed from Louisiana and become a resident of Tennessee. No person representing her succession was within the jurisdiction of the Court.

In the suit for the revival of the judgment it was sought to comply with Article 3547, and so give the Court jurisdiction in the following three ways. Each was by substituted service.

1.

By the appointment of a *curator ad hoc*. No citation was served upon him. He attempted to waive citation it is true—Record, p. 109—but in his official capacity as a representative of an absentee, he could neither waive citation or any other right of the absentee.

Collins vs. Bierce, 17 La., 117.
Hill, et al, vs. Barlow, 6 Rob. 144.
Civil Code, Art's 57–116–964.
Hyde vs. Craddie, 10 Rob. 393.
Krughler vs. Bank of U. S. 12 Rob. 465.
Glacours vs. Lane, 28 An. 259.
Ticknor vs. Calhoun, 33 An. 212.

Nothing but the service of the citation can interrupt prescription.

Furthermore, the appointment of a *curator ad hoc* was utterly futile, for Mrs. Warfield was dead, and no property of hers was within the jurisdiction of the Court, nor were her heirs within such jurisdiction.

Bracy vs. Calderwood, 36 An. 797.

II.

It was attempted to confer jurisdiction for the revival of the judgment by the appointment of Austin Green, Clerk of the District Court, as Administrator of Mrs. Warfield.

But Mrs. Warfield had no succession in Louisiana, and the Court had no jurisdiction to appoint an administrator.

The Civil Code, Art. 934, provides for the opening of the succession of any deceased person as follows:

"In the parish where the deceased resided," or "in the parish where the deceased owned immovable property," or "in the parish where deceased has died."

The Code provides for no representation such as was sought to be set up by the appointment of Austin Green, as administrator. Her succession, if any, was in Tennessee.

Furthermore, Green was not cited.

See general Brief, pp. 36, 37, 38, 39, 40.

III.

It was sought to confer jurisdiction upon the Court for the revival of the judgment by the citation of William T. Atkins, who had long before been the assignee of Mrs. Warfield, under the National Bankrupt Law of 1867, and upon this appellees rely.

We insist that Atkins was never the personal representative of Mrs. Warfield, so as to be cited under Article 3547 of the Civil Code.

It is not even pretended that he was invested by her with any agency or similar representative capacity. If he was in any sense her agent or representative, it was by reason of the operation of the Bankrupt Law of 1867.

An assignee, however, is the representative of the creditors, not the agent of the debtor.

41 Mich. 513.

2 Bankruptcy Reg. 355, re Metzger.

In *Metz vs. R. R. Co. 58 N. Y.*, it is expressly stated that the assignee is not the agent of the bankrupt.

In the case of *Chapman, Executrix, vs. Nelson, et al, 31 An. 342*, the Supreme Court said:

"The Act of 1853, re-enacted in the revised statutes (section 2813) and embodied in the Revised Civil Code as Article 3547, after declaring that judgments for money shall be prescribed by the lapse of ten years after they are rendered, provides, however, that any party interested in said judgment may have the same revived, at any time before it is prescribed, by having *a citation issued according to law, to the defendant or his representative.* . . . . . This statute evidently contemplates but two parties to the proceeding, the judgment creditor (the plaintiff or such other person as may be intended in the judgment,) and the judgment debtor, the defendant in the original suit. The word 'representative' simply means the *agent or attorney in fact*, if the defendant be living, or the *curator, executor or administrator*, or the *heir*, as the case may be, if he be dead; the person having authority and capacity by appointment of the defendant, if he be living, or by judicial appointment, or by

the effect of law, if he be dead, to be cited and to stand in judgment in his room and stead. If he be living, absent and not represented, he must be cited through the *curator ad hoc*, appointed by the Court for that purpose. . . . . The naked question is, has the plaintiff the right to have the judgment revived in this proceeding, and the question is to be determined solely between the plaintiff, the judgment creditor or his legal representatives, and the judgment debtor, the defendant or his legal representative. . . . . The assignee is the representative *of the creditors*, so far as the *estate* of the bankrupt is concerned; but *he is not* the representative *of the bankrupt*, for the very good reason that the bankrupt has no rights or interests to be protected or represented. By the surrender he abandons his rights, credits, effects and property to his creditors; and the law discharges him from his liability for debts contracted prior to the date of the surrender, and provable against his estate in bankruptcy."

And the Court adds: "See *Serra e Hijo vs. Hoffmon, 29 An. 18–23*, where this subject is fully discussed."

And further, the Court says—

"*The assignee is not the representative of the judgment debtor*, the defendant, *in the sense of the Act of 1853;* and the bankrupt *cannot* be brought into Court for ANY PURPOSE *by citing the assignee.*"

See *23 An. 180, Hopgood vs. Dawson.*

If under this doctrine Atkins was not the general representative of Mrs. Warfield, much less was he her representative touching the particular property involved in this action, since it was never in his hands, but had been transferred by Mrs. Warfield to Dr. Dinkgrave the year before Atkins became her assignee.

"The assignee represents the bankrupt only as to such property as the bankrupt had or could have claimed at the time of the assignment, and the assignee can take only such property as belonged equitably as well as legally to the bankrupt."

6 Gray (Mass.) 520.

125 Mass. 43–46.

126 Mass. 230.

Ontario Bank vs. Mumford, 2 Barb. Ch. 596.
Rogers vs. Wilson, 6 Bankr. Reg. 246.
In re Dow, 6 Bankr. Reg. 10.

Mrs. Warfield had no title, either legal or equitable to "Oak Grove" when she assigned. Atkins, therefore, never had title to it or any interest in it whatsoever.

"An assignee should not be made a defendant in any action against the bankrupt, unless he has some right to the property in question."

Gunther vs. Greenfield, Abb. (N.Y.) Pr. N. S. 191.
Willard vs. Brigham, 25 An. 602.

But even if a representative capacity should be imputed to Atkins, then section 5057, of the Act of 1867, (Revised Statutes p. 982) expressly forbids suits against an assignee in bankruptcy except within two years from his appointment, and this suit for revival was brought nine years after his appointment.

Phelps vs. McDonald, 99 U. S. 298.
Bailey vs. Glover, 21 Wall. 342.
Jenkins vs. Bank, 106 U. S. 571.
Payson vs. Coffin, 4 Dill. 386.

It is respectfully submitted that the decree of the Supreme Court of the State of Louisiana should be reversed for the reasons above given.

SHERMAN HARTWELL HUBBARD,
of Counsel.

Office Supreme Court U. S.
FILED
JAN 4 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 178.

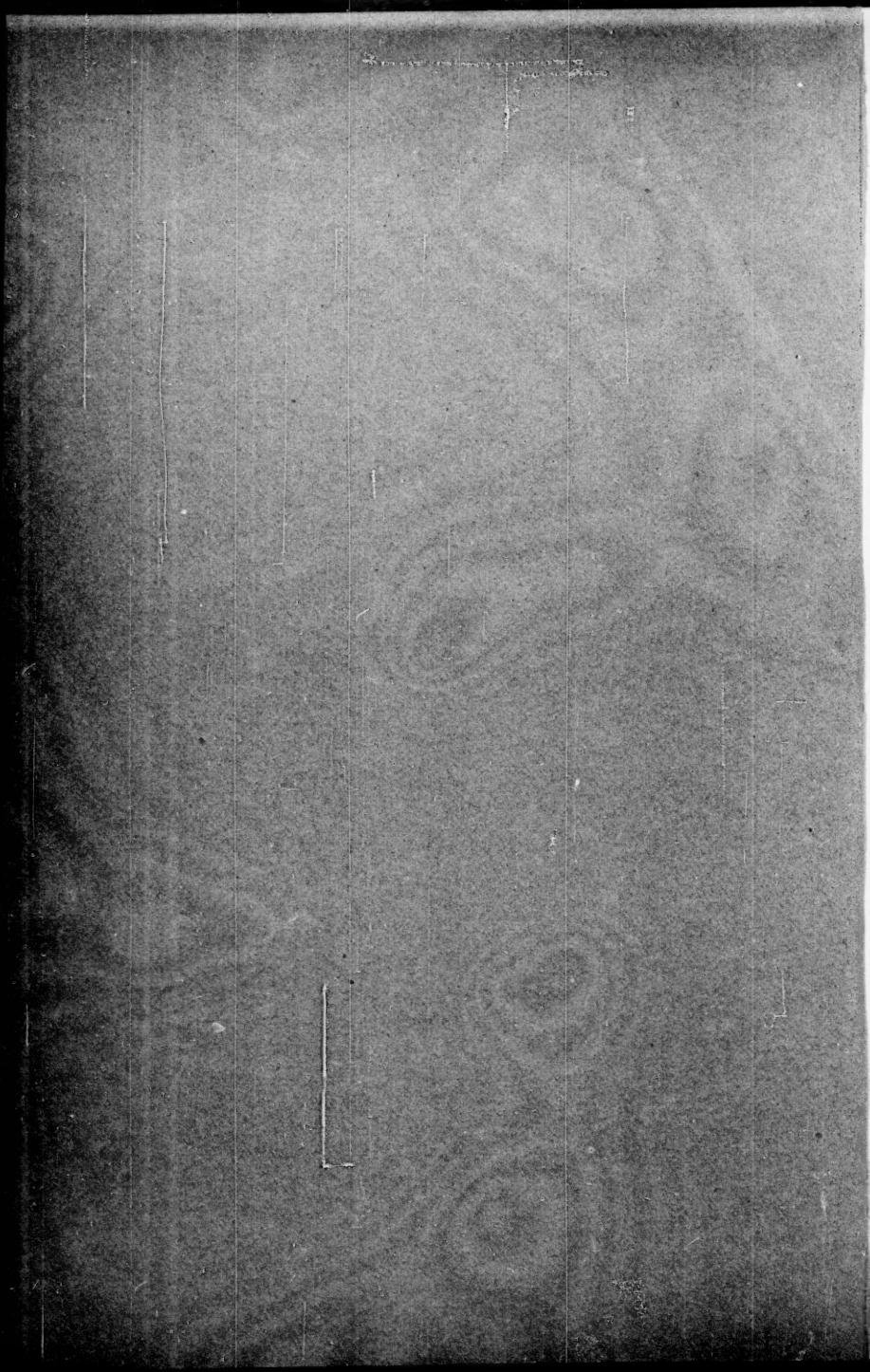
M. C. LUDELING, Ex'r, etc., Appellant,

vs.

JOHN and CHARLES CHAFFE et al., Appellees.

Brief in behalf of appellees by Charles J. Boatner, of counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 178.

M. C. LUDELING, Ex'r, etc., Appellant,

vs.

JOHN and CHARLES CHAFFE et al., Appellees.

Brief in behalf of appellees by Charles J. Boatner, of counsel.

STATEMENT OF THE FACTS AND PLEADINGS.

On the 20th of March, 1874, John and Charles Chaffe obtained judgment in the district court of Ouachita parish, Louisiana, against Mrs. E. W. Warfield for the sum of $5,000, with interest and subject to certain credits.

This judgment was recorded in the mortgage book of the parish on the 21st of March, 1874, and operated as a legal mortgage upon all the real property of the judgment debtor situated in the parish. (C. C., article 3321.)

On June 30, 1875, Mrs. E. W. Warfield sold to B. H. Dinkgrave a tract of land known as the Oak Grove plantation for a cash consideration of $3,782.36, the parties dispensing with a production of the mortgage certificate required by

law and Mrs. R. C. Strother making herself a party to the deed and guaranteeing and warranting the title.

On the 10th of March, 1881, John and Charles Chaffe instituted a hypothecary action against John T. Ludeling to enforce the payment of the balance due on said judgment by the seizure and sale of the Oak Grove plantation, which the said Ludeling had acquired from the succession of B. H. Dinkgrave, and which they averred was burdened with a judicial mortgage in their favor. (Trans., page 88.)

John T. Ludeling answered that he had acquired the property at a succesion sale and had sued out a monition under the laws of the State, which had been confirmed and the proceeds of the property distributed among the heirs and creditors, and that if plaintiffs had any claim against the said property they should have asserted it before the homologation of the said monition and distribution of the price thereof by the administrator.

If this be overruled he pleads a general denial and makes the following special defenses:

1. That Mrs. Warfield owned other land in the parish of Ouachita at the date of her sale to B. H. Dinkgrave and since, which would be liable for the payment of the alleged judgment of plaintiff before the land sold to B. H. Dinkgrave could be subjected to said judgment, if at all.

2. That at the time B. H. Dinkgrave acquired said land she owed a large amount of taxes, which operated as a lien and privilege upon all her property; that B. H. Dinkgrave paid these taxes to the full amount of the price stated in the sale from Mrs. Warfield to him, and that he and the succession of Dinkgrave were subrogated to the rights of the State and parish, so far as the plaintiffs are concerned, and the plaintiffs cannot in equity enforce their mortgage against the property before reimbursing the amounts paid by Dinkgrave, which released the property of Mrs. Warfield from a prior lien and privilege.

3. Reserving his right to claim the value of improve-

ments made on the property, he alleges that he is informed and believes the sale of the Bonair plantation, belonging to Mrs. Warfield, was illegal, null, and void on certain grounds which he sets forth, and that said property and other which he describes had been bought by plaintiff at an amount far less than their value, and that it would be inequitable and wrong to permit the plaintiffs thus to enrich themselves at the expense of others, and that in equity the judgment should be credited with the real value of the lands.

He further averred that he had been informed by Dr. Strother, son-in-law and agent of Mrs. Warfield, who is also dead, that there was an agreement between plaintiff and himself that the judgment might be satisfied by the payment of 50 per cent. of the balance due, or by permitting plaintiffs to purchase the dwelling-house and lots in full satisfaction thereof, and the said compromise had been executed and the judgment satisfied by plaintiffs purchasing the property at less than its real value.

Finally, he called the succession of Dinkgrave in warranty to defend his title and prayed for judgment against it in the event of eviction, and for the value of the improvements placed by him upon the land. (See Trans., pages 89 to 92.)

The succession of Dinkgrave answered the call in warranty, reiterating the defenses set up in defendant's answer. Amended answers were filed by defendant and warrantor reiterating the plea that the price of the property had been used in the discharge of a lien upon the same which primed plaintiffs' mortgage, and that plaintiffs could not proceed against the property without reimbursing the amount so paid. (Trans., pages 94 and 96.)

The case was tried on these issues, and the court held that the succession sale did not discharge mortgages imposed upon the property and with which it was encumbered when Dinkgrave became the purchaser; that Dinkgrave and his assigns were estopped by the declaration in the deed

from asserting that the price was paid other than in money; that defendants could not point out for discussion property the title to which was in dispute, and held against defendants on the merits of their defense, and gave judgment in favor of the plaintiffs, decreeing the judgment to be a valid mortgage on the property in dispute, to rank and take effect from the 21st of March, 1874, the date of the record of the said judgment in the mortgage records of Ouachita parish. The demand of defendant for improvements was nonsuited and the claim of the warrantor for taxes paid allowed to the amount of $936.00. (See Trans., pages 96 and 97.)

From this judgment defendant Ludeling appealed to the supreme court of Louisiana, which affirmed the judgment against him, but amended it in favor of plaintiffs by disallowing the amount of taxes directed to be refunded to the warrantor.

On the ninth of February the plaintiffs, John and Charles Chaffe, filed a rule in the district court of Ouachita parish alleging themselves to be the owners and parties plaintiff in suit No. 1020 on the docket of the 14th district court of said parish, entitled John and Charles Chaffe *vs.* E. W. Warfield, in which judgment had been rendered on the 20th of March, 1874; that there was an unpaid balance on said judgment, and they desired to have the same revived; that the present court was the successor of the 14th judicial court, and as such had charge of its records and jurisdiction of its business; that since the rendition of said judgment the defendant had, on her own application, been adjudged a bankrupt and her assignee had never been discharged from his trust and had his domicile in the parish; that Mrs. E. W. Warfield had since died, leaving descendants who are absentees from the State, and if said descendants are in any sense the representatives of the deceased, then the appointment of a *curator ad hoc* is necessary. They further show that the clerk of the district court, under authority of the laws of Louisiana and an order of the court, had assumed the ad-

ministration and qualified as administrator of her estate; wherefore they pray that a *curator ad hoc* be appointed to represent the absent heirs of Mrs. Warfield, and that the said curator, the administrator, and the assignee be cited, and on due trial that the judgment referred to be revived.

On same day the judge, by an order indorsed on the petition, appointed R. G. Cobb, an attorney-at-law, *curator ad hoc* to represent the absent heirs of Mrs. E. W. Warfield, and especially Mrs. Eliza Strother, residing in the State of Missouri.

On same day the *curator ad hoc* waived service of the petition of revival and citation, and citation to the assignee was issued by the clerk and served by the sheriff on the same day.

On the 18th of February, 1884, each of said parties filed answers in said cause. On the 19th the case was taken up, tried, and judgment rendered in favor of plaintiffs, reviving the judgment. (See Trans., pages 108 to 113, inclusive.)

On the 4th of March, 1884, execution was issued on the judgment rendered in the hypothecary action of Chaffe *vs.* Ludeling, No. 1668, commanding the seizure of the property which had been decreed subject to plaintiff's mortgage, and the sheriff seized and advertised the property for sale. (See Trans., pages 114 and 115.)

On the 8th of May plaintiff in error obtained an order of injunction against the sale of this property on substantially the same grounds set forth in his answer to the hypothecary action; in addition he pleaded the prescription of ten years against the judgment upon which plaintiffs proceeded. He averred that William T. Atkins, assignee, had disposed of all the property which came in his possession, and on or about the 16th of October, 1879, had rendered an account of his administration to the United States district court, and in his opinion and belief became *functus officio;* that Mrs. Warfield left the State permanently in 1880 and died in the State of Tennessee; that she never obtained her discharge from

bankruptcy; alleges that she did not reside in the parish of Ouachita at the time of her death and had no property situated therein, unless it was the Bon-air plantation, claimed to have been bought by J. and C. Chaffe at sheriff sale in September, 1876, and if she owned that its value was several times greater than $500, and the clerk of the court was unauthorized by law to administer the same; that the order of the judge authorizing Austin Green to administer said estate was made in error, is illegal, unauthorized by law, null and void. He denies that any legal service, citation, or petition has been served on any legal representative of Mrs. E. W. Warfield. He denies that Atkins, assignee (if he was such), at the time of said service, which is denied, could be sued in the State court, the said debt of J. and C. Chaffe having already been proved and recognized in the district court of the United States having jurisdiction of the bankruptcy proceedings against the estate of E. W. Warfield; that he has been informed and believes that when the citation in the suit of Chaffe was served, said Atkins was sick in bed and unable to attend to business, and died on the 22d of February, 1884. He denies that Austin Green, clerk, legally represented the succession of E. W. Warfield, and charges that the judgment of revival has no validity or legal effect. He charges that the same was obtained irregularly, by collusion between those pretending to represent Mrs. E. W. Warfield's estate or the assignee and the plaintiff.

Wherefore he prays that the sheriff, John and Charles Chaffe, and Robert Breard be cited, and that an injunction issue, restraining the sheriff from further proceeding against the property of petitioner until all the property aforesaid alienated since the sale by Mrs. Warfield to B. H. Dinkgrave, in 1875, be first subjected to the mortgage of said J. and C. Chaffe, and for that purpose the sale alleged to have been made by Deputy Sheriff Wood to J. and C. Chaffe on or about the 16th of September, 1876, be declared null and

void and subject to said special mortgage of J. and C. Chaffe, unless it be held that said mortgage has been extinguished by confusion, prescription, or pre-emption. He further prays that the sale of the property before described, sold under order of the district court of the United States by Atkins, assignee, be declared to have been made without affecting the mortgages thereon, in so far as the rights of your petitioner, a third possessor, are to be affected. He further prays that Austin Green be cited, and that the order appointing him administrator of the estate of Mrs. E. W. Warfield be set aside and declared null and void, and that the injunction be perpetuated. (Trans., pages 1 to 9.)

The defendants appeared and pleaded the judgment rendered in the case of J. and C. Chaffe *vs.* John T. Ludeling as *res adjudicata* against all of the plaintiff's petition except the plea of prescription, which being sustained they filed an answer pleading the general issue and alleging that the injunction had been taken out for delay; that they had been compelled to employ counsel at an expense of $500, and praying for the dissolution of the injunction, with damages. (See Trans., page 19.)

On final trial the district court overruled the plea of prescription and gave judgment dissolving the injunction, with damages. A clear and accurate statement of the case and the law of Louisiana applicable thereto will be found in the opinion of the district judge, printed in the record, page 33 *et seq.*

The plaintiff in error appealed to the supreme court, where he filed the following assignment of errors:

That the judge misconstrued the act of Congress of March 2, 1867, and its amendments relative to bankruptcy in holding that the assignee was the legal representative of E. W. Warfield and was as such properly cited in the suit of J. and C. Chaffe *vs* E. W. Warfield to revive the personal judgment sought to be enforced against appellants' property and thereby deprive him of a vested right to his property

acquired by purchase and the prescription of said judgment heretofore pleaded, in violation of the fifth amendment of the Constitution of the United States. He avers that the citation served on Atkins, assignee of E. W. Warfield, after she had moved out of this State and after her death could not be effectual against her or her representatives, heirs living in Tennessee and Missouri, and was not "due process" of law, and if either the act of Congress aforesaid or the act of 1853 of Louisiana, re-enacted as article 3547 of the Civil Code, provides such mode or constructive service to bring the absent and dead judgment debtor and defendant into court (which is denied), said act of Congress and State law are in contravention to the first section of the fourteenth amendment and fifth amendment of the Constitution of the United States and are null and void.

He further pleads that under the bankrupt act of 1867 no suit could be brought or maintained against the assignee unless brought within two years after the cause of action arose. (Trans., pages 141 and 142.)

The supreme court of Louisiana affirmed the judgment of the lower court, and plaintiff in error brings the case to this honorable Court on the assignment of error above quoted.

ARGUMENT.

The chief justice of Louisiana in granting the order for a writ of error declared he did not consider that any Federal question had been passed on in the case, but as it was claimed one might be considered to exist by your honorable Court he granted the writ.

The Federal questions which plaintiff in error presents are:

1. That the judge misconstrued the act of Congress of 2d of March, 1867, in holding that an assignee in bankruptcy

was the legal representative of the bankrupt in this particular case, and as the effect of such a decision was to suspend the prescription of a lien on his property it deprives him of his property without due process of law.

2. That if article 3547 of the Civil Code of Louisiana, which provides for the revival of a judgment by service of a citation on the judgment debtor or his representative, authorizes bringing the defendant into court by constructive service it is in contravention of the fifth and fourteenth amendments of the Constitution; if the bankrupt act authorizes the assignee to represent the dead or absent judgment debtor it is likewise in violation of said amendments; and, finally, that the action against the assignee to revive the judgment is barred by two years' limitation under the bankrupt act of 1867. It is very difficult to perceive the application of any of these points to the case under consideration. The court was called upon to construe the following statute of the State of Louisiana:

"Article 3547, C. C. All judgments for money shall be prescribed by the lapse of ten years from the rendition of such judgments: *Provided, however,* That any party interested in any judgment may have same revived at any time before it is prescribed by having a citation issued according to law to the defendant or his representative from the court which rendered the judgment, unless defendant or his representative show good cause why the judgment should not be revived; and, if such defendant be absent and not represented, the court may appoint a *curator ad hoc* to represent him in the proceedings, upon which *curator ad hoc* the citation shall be served. Any judgment revived as above provided shall continue in full force from the date of the order of court reviving the same."

The supreme court of the State of Louisiana, in 33 Annual, 314, said: "We regard a proceeding to revive a judgment not as a new suit, but simply as a proceeding in the same

suit to continue and keep alive a judgment therein rendered and to furnish proof that it has not been satisfied or extinguished."

And the Court in this case distinctly holds that a suit, though prosecuted to judgment, is a pending suit until the judgment is paid or otherwise extinguished. This theory is supported by the provision of the law which requires that the citation for revival must issue from the same court which rendered the judgment. In Chapman *vs.* Nelson, 31 Annual, 341, the motion to revive was dismissed because not filed in the court which rendered the judgment nor one which succeeded to its jurisdiction.

It is therefore apparent that the question of constructive service is not involved in the case. By the service and return of process in the original case the court acquired jurisdiction, and this jurisdiction necessarily authorized the court not only to render a decree, but to execute it upon any property within the territorial limits of its jurisdiction.

If the defendant remove from the jurisdiction of the court pending the suit and it become necessary to serve any notices or move for any interlocutory orders the law of the State may charge the defendant with notice thereof or may provide for constructive service by publication or the appointment of an officer to represent the absent defendant; otherwise the party sued might completely stop proceedings against him by moving out of the jurisdiction of the court and leaving no one to represent him. He might in the same way defeat the execution of a judgment against him in Louisiana because he is entitled to notice of seizure, and under plaintiff 's construction of the law service of such notice upon a *curator ad hoc* would be void. That such a construction of the law is erroneous need not be argued. Taking for granted that a motion to revive is a suit in the sense of the law and a personal action against the judgment debtor, the plaintiff in error argues that the principles laid down in Pennoyer *vs.* Neff apply, and that the judg-

ment cannot be revived unless the defendant be brought into court personally or by property; from which would result the deduction that where the defendant does not reside within the jurisdiction of the court and does not own property there, the judgment must perish, not because the State law does not provide the means to preserve it, but because such means are repugnant to the constitution.

As well might it be said that the law of Louisiana which authorizes the registry of a judgment *ex parte* and from such registry creates a judicial mortgage on all the immovable property of defendant is unconstitutional because not preceded by notice, or that the reinscription of a mortgage or judgment about to pre-empt on the record is void for the same reason.

It is admitted that the State has absolute power on the question of the prescription of the judgments rendered by its courts.

Formerly they were imprescriptible; then the term of ten years was fixed and a method of revival provided, which, however, is not exclusive of other means by which the life of a judgment may be preserved (30 A., 1071). It is apparent that if the legislature of Louisiana is authorized to establish the form of proceedings to revive a judgment about to become extinguished by lapse of time, it has full and plenary authority and may establish such form of proceeding as conforms to legislative discretion. The proceeding may be *ex parte* or contradictory, and, if the latter, on such terms as the law imposes.

The law declares that a conventional mortgage expires by limitation unless reinscribed within ten years after its original inscription, but to obtain this *reinscription* it is only necessary that the mortgagee shall apply *ex parte* to the recorder of mortgages for that purpose.

The law is the same with respect to judicial mortgages. Had the Chaffes failed to cause the reinscription of their judgment in the mortgage book prior to 21st of March, 1884,

the mortgage resulting from its inscription on 21st March, 1874, would have ceased to exist and plaintiff in error would have been discharged from its effect. Yet this inscription was made without notice to him or the judgment debtor, and is the very foundation of defendant's rights.

"The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority."

A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had where is drawn in question * * * the validity of a statute of or an authority exercised under the United States and the decision is against their validity, or where is drawn in question the validity of a statute of or an authority exercised under any State on the ground of their being repugnant to the constitution * * * and the decision is in favor of their validity, may be re-examined, &c. (U. S. R. S., sec. 709.)

Certainly plaintiff in error cannot contend for jurisdiction in your honorable court because incidentally the bankrupt act of 1867 was referred to by the State court. Neither its validity or any authority exercised under it was called in question, nor was there any judgment adverse to either; on the contrary, the decree was favorable to the validity of an act done by an officer appointed under its provisions. This leaves nothing for consideration, except the charge that the statute authorizing the revival of judgments is unconstitutional because it provides for substituted or constructive service, and he is being deprived of his property without "due process of law" because of the enforcement of this unconstitutional statute.

No authority is cited in support of this position which has any application to the question at issue.

In 15 Wall., 393, the case was brought up on the con-

struction of the act of Congress providing that no deed not properly stamped should be received in evidence. "The decision was against the right claimed by the defendant under the act of Congress and necessarily involved its construction." It therefore arose under a law of the United States.

In Gregory *vs.* McVeigh, 23 Wall., 294, suit had been filed to cancel a sale and adjudication of property "made under what is commonly known as the confiscation act," approved July 17, 1862. The proceedings assailed as invalid had been conducted in the United States circuit court for the district of Virginia. The decision of the State court and that of last resort was adverse to the right of the purchaser of the property under these proceedings, and your honors say, in disposing of it: "It is sufficient to say we think the case involves the consideration of a Federal question. The proceeding in the district court was under the authority of the United States, and its validity was drawn in question."

Pennoyer *vs.* Neff, 5 Otto, 733, merely holds that a personal judgment cannot be rendered against one not cited and who does not appear to defend the suit. In other words, the court must have jurisdiction of the person or the thing in controversy, and, wanting such jurisdiction, any judgment rendered is void.

Here there can be no question of jurisdiction. The judgment sought to be revived had been rendered by the very court called upon to revive it, and under the terms of the law no other court could do so. There was no question of personal liability, because that was fixed by the judgment itself, which had been rendered on citation to the defendant.

The sole and only question before the court was prescription *vel non*. None other could be considered after the plea of *res adjudicata* had been sustained. The Virginia cases (10 Otto, 347 and 319) have no possible application.

If plaintiff in error has been deprived of any right, privi-

lege, or immunity granted him under the Constitution or laws of the United States the record does not show it, nor does he specify what it is. The citation from Virginia *vs.* Rives, 10 Otto, is unfortunate. Certainly plaintiff in error does not contend that he has been denied, or cannot enforce in the judicial tribunals of the State, any right secured to him by any law providing for the equal civil rights of citizens of the United States. The record shows no such complaint.

Plaintiff in error complained to the State court that much of the property of the judgment debtor had been illegally sold and sacrificed, and that if it had brought its full value defendants' judgment would have been discharged, and in equity must be considered as discharged, because of the purchase by defendants Chaffe of the property below its value. The State court decided that if such a defense was available to plaintiff he should have urged it in defense to the hypothecary action brought against him by the Chaffes to enforce their judgment against the property in his hands. Having failed to set it up in defense to the suit he cannot avail himself of it by way of information to the execution of the judgment rendered therein. Surely no Federal question is raised by this issue and decision.

He further contends that the Bon Air plaintation was sold under consent judgment, on terms different from those prescribed by law, and, not being a judicial sale, by reason of these facts, did not release the property from subsequent judicial mortgages; wherefore he contended that the property was subject to the Chaffe judgment and had to be discussed before the property in his hands could be sold, and he cites a number of decisions of the supreme court of Louisiana in support of the position; but this was also held barred by the plea of "*res adjudicata.*" Does this involve the construction of the Constitution or any act of Congress, or involve any right, privilege, or immunity guaranteed to plaintiff in error under either?

He contends that the judgment which is the basis of the

mortgage asserted against him is barred by prescription, because more than ten years have elapsed since it was rendered and it has never been legally revived, the right accruing from prescription under the law of *Louisiana*. The vices which he asserts render invalid the judgment of revival result from alleged non-compliance *with the laws of Louisiana*.

He says: "The appointment of Austin Green as administrator to Mrs. Warfield's succession was void, because under the laws of Louisiana—not having died in the State and having left no property in it—no estate could be opened;" but the supreme court of Louisiana entertained a different opinion.

He complains that the law of the State under which this administrator had been appointed had been repealed, and that the administrator, if legally appointed, had no right to acknowledge service of citation and appear by answer in the cause; and he made the same points as to the *curator ad hoc*. The court likewise differed with him in this proposition and held that the judge who rendered the judgment had both jurisdiction and proper parties before him.

Surely all these were matters which arose under the laws of the State and not of the United States. A large number of cases are cited and commented on at great length showing what the supreme court of Louisiana has said with reference to the necessity and right to make an assignee a party to a rule to revive a judgment against a bankrupt. The court has held that neither an assignee who has been *discharged* nor a *discharged* bankrupt could be cited—the former that, being *functus officio*, he was no longer the representative of defendant or his estate; the latter, by virtue of his discharge, was neither defendant nor representative of the defendant in the judgment.

Neither contingency was presented in this case. The assignee had never been discharged from his trust nor had the defendant been discharged from her debts. The former,

then, had capacity to stand in judgment for and in behalf of the bankrupt estate, while the latter through her heirs and property, if she had left any, was still liable for the judgment.

But if the Supreme Court, in construing the laws of Louisiana, had been holding for many years that a certain form of proceeding was invalid, and had in this case changed the ruling to the great disadvantage of plaintiff in error, would that create a Federal question appealable here? It might work a great hardship, but so do all unjust judgments and oppressive verdicts. This court obtains no jurisdiction from such causes.

The truth is, however, that no ruling is changed nor injustice done. Under the laws of Louisiana the revival would have been good as against either of the then defendants made parties. With all possible parties before the court, the complaint is utterly groundless. The administrator represented the estate of the deceased judgment debtors, the *curator ad hoc* her heirs, and the assignee her estate in bankruptcy still unclosed. Either or all of them could have urged any defense to the rule which the law allowed or the facts warranted.

On the merits the defense was without equity.

The sale of the Bon-Air plantation had been made under judgments which primed that of the Chaffes, and the entire proceeds of the sale paid over to these judgment creditors. Certainly the validity of that sale could not be questioned in the absence of the creditors at whose instance it was made and who would be liable in warranty if it should be declared void; and it seemed preposterous to assail collaterally in a State court the validity and *bona fides* of proceedings authorized and directed by the United States district court, executed by its officers, and approved by distribution of the funds realized by the sale. For the State court to have entertained such a demand would have been an unwarranted interference with the jurisdiction of a concurrent court.

The grounds of defense are bald technicalities.

It will hardly be disputed that after the supreme court of the State had decided that defendants in error had a valid lien upon the lands in controversy if the law did not provide the means by which these rights might be preserved and the judgment executed, the law in Louisiana must be very lame; yet this is just the contention. The judgment was about to perempt, and, while the law nominally provided for its revival, it was inoperative because neither defendant nor her representative could be cited.

Defendant could not be, because she was dead.

Her estate could not be, because, having died out of the State and left no property in it, her estate could not be spread.

Her heirs could not be, because they resided out of the State and could not be brought in by constructive service.

The assignee in bankruptcy could not, because he was not her *representative* in the sense of the law of Louisiana, and if he was the law is unconstitutional in providing for substituted service in a personal action.

It is clear that, defendant being dead, the judgment had to be revived against her representative, if at all. This was (1) the fictitious being known to the law of Louisiana as her "succession;" (2) her heirs; (3) the assignee of her estate in bankruptcy, who had not been discharged or released from his trust. "Succession signifies also the estate, rights, and charges which a person leaves after his death, whether the property exceeds the charges or the charges exceed the property or whether he has only left charges without any property." (R. C. C. of La., art. 872.)

The order of the judge directing the clerk to assume the administration of this estate was one within the scope of his jurisdiction, and therefore has its free legal effect, even if it be admitted that it was illegally or improvidently rendered. The acts of a *de facto* officer, though subsequently held to have been illegally appointed, are valid and binding; hence

the appearance and answer of the administrator to the rule would in my judgment suffice to support the decree of revival, even if it be admitted the appointment was illegal.

The heirs, being absentees, were properly represented by a *curator ad hoc.* (Code of Practice of La., art. 195, and C. C., 3547.)

Plaintiff in error does not deny the correctness of this proposition as a general rule, but insists that, this being a personal action, they could not be brought in by constructive service, and if they could this proceeding is void because the curator *waived citation.* The first objection is fully refuted by the decision we have cited, showing that this proceeding was not a suit or personal action, but a mere continuance or order rendered in a pending suit, the parties to which are before the Court and who are notified to appear and show cause why the judgment previously rendered therein should not continue in force.

The second is disposed of by a later case directly in point (Fly *vs.* Noble, 37 La. An'l Rep., 667). It is there said: "An acknowledgment of service by a *curator ad hoc* implies an admission of actual service. The opposition subsequently filed by him is in the nature of an answer, and cured what irregularity, if any, existed."

The administrator of an estate, in presenting his account of administration, had provoked the appointment of a *curator ad hoc* to represent the absent heir, who had acknowledged service of the account and subsequently filed an opposition to its homologation.

The proceedings were afterwards attacked as illegal because the curator had no authority to waive any rights. The court held that if the waiver of service was an irregularity it had been cured by the subsequent appearance and answer of the officer.

In this case the curator appeared and filed his answer before the judgment would have prescribed—that is, ten years from the rendition of the judgment elapsed on February

20. The answer was filed on the 18th, two days in advance of prescription, and when citation could still have been served had the curator failed to appear.

The supreme court of Louisiana has held, and it is now *stare decisis* that the assignee is the "representative" of the judgment debtor, upon whom the citation of revival must be served when the defendant is a bankrupt who has not been discharged from his debts nor the assignee from his trust.

It is respectfully submitted that the question is one purely of construction of the law of Louisiana, and the motion to dismiss must prevail.

C. J. BOATNER,
Of Counsel.

Office Supreme Court U. S.
FILED.
JAN 6 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 178.

JOHN T. LUDELING, PLAINTIFF IN ERROR,

vs.

JOHN CHAFFE, CHARLES CHAFFE, J. E. MAGUIRE, SHERIFF, AND AUSTIN GREEN, CLERK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Additional brief for the plaintiff in error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 178.

JOHN T. LUDELING, PLAINTIFF IN ERROR,

vs.

JOHN CHAFFE, CHARLES CHAFFE, J. E. MAGUIRE, SHERIFF, AND AUSTIN GREEN, CLERK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Additional brief for the plaintiff in error.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the supreme court of the State of Louisiana affirming the district court of Louisiana in its refusal to enjoin the execution of a judgment rendered against the plaintiff in a case entitled "J. and C. Chaffe *vs.* Ludeling." J. and C. Chaffe were creditors

of Mrs. E. C. Warfield to the amount of $5,000.00. They reduced their claim to a judgment, which was rendered on the 20th of March, 1874, and was recorded on the 21st of March of the same year in Ouachita parish (Record, pages 105, 106). At the time the judgment was rendered Mrs. Warfield owned in Ouachita the "Bon Air" and the "Oak Grove" plantations, upon each of which, by virtue of the laws of Louisiana, the record of judgment gave to the Chaffes a judicial mortgage to secure its payment. Proceedings were taken in 1875 to sell these two plantations to satisfy the judgment. By virtue of an arrangement, the details of which are not here material, between the judgment creditors and Mrs. Warfield and the collector of public taxes, Dr. Dinkgrave, the taxes which were a first lien upon the two pieces of property were paid by Dinkgrave, and, as a consideration therefor, he took a deed to the Oak Grove plantation from Mrs. Warfield. The proceeding to sell Oak Grove was thereupon stayed by the Chaffes, while that against the Bon Air plantation was allowed to proceed. This was in 1875. Dinkgrave died in that year, and Ludeling purchased at his succession sale Oak Grove plantation. On September 11, 1876, Mrs. Warfield filed her petition for adjudication of bankruptcy (Record, page 117). On that day she was adjudged a bankrupt. An assignee, W. T. Atkyns, was appointed, who petitioned for an order of sale of all the property contained in her schedule (Record, page 118), and this sale was made (Record, pages 119, 120), and on the 15th of October, 1879, the assignee filed with the act of sale his final account disposing of all the property. By a compromise authorized by the district court the Bon Air plantation, which we have

seen was about to be sold in the State court to satisfy the judgment of Chaffe in 1875, was sold in that court after the bankruptcy proceedings were begun, and was bid in by the Chaffes. A large part of the judgment against Mrs. Warfield remained unpaid. Chaffe, therefore, began an hypothecary action against Ludeling, who had become the third possessor and owner of the Oak Grove plantation, in the manner we have described, to compel him to pay the judgment or surrender the land (Record, page 87). Ludeling resisted this suit on many grounds, claiming, among other things, that Dinkgrave, his predecessor, was subrogated to the prior lien of the State for taxes, the payment of which had formed the consideration for the conveyance of the lands to him by Mrs. Warfield. Ludeling also claimed that there were other pieces of property out of which the judgment should first have been paid, which Chaffe had obtained possession of by collusive proceedings, without the payment of proper value for them. All these objections were overruled, and judgment was given against Ludeling that he should either pay the money, the balance due on the judgment, or surrender the Oak Grove plantation. Before the judgment was carried out Ludeling began this action to enjoin the execution of the judgment in the hypothecary action just referred to. He stated in his petition a number of grounds, of which we shall notice in this brief but one. He averred that under the laws of Louisiana the original judgment of Chaffe against Mrs. Warfield was prescribed, and that the lien thereby given upon all property of Mrs. Warfield had ceased to have effect. Ten years had elapsed after the record of the Warfield judgment and before Ludeling filed his petition in this action.

Article 3547 of the Civil Code of Louisiana provides as follows:

"All judgments for money shall be prescribed by the lapse of ten years from the rendition of such judgments: Provided, however, that any party interested in any judgment may have same revived at any time before it is prescribed by having a citation issued according to law to the defendant or his representative from the court which rendered the judgment, unless defendant or his representative show good cause why the judgment should not be revived; and if such defendant be absent and not represented, the court may appoint a *curator ad hoc* to represent him in the proceedings, upon which *curator ad hoc* the citation shall be served. Any judgment revived as above provided shall continue in full force from the date of the order reviving the same."

An attempt was made to revive the judgment, and it is upon this attempted revivor that the question in the present case arises. It is contended on behalf of the plaintiff in error that neither the debtor nor her proper representative was properly cited in the action to revive. Mrs. Warfield moved from Louisiana to Tennessee in 1879 and died there in 1882 (Record, page 49). The proceeding to revive was in 1884. The defendants in the action to revive were, first, the assignee in bankruptcy of Mrs. Warfield, whose final account, as we have seen, had been filed in 1879. Mrs. Warfield had never received her discharge in bankruptcy (Record, page 117), though a rule had been issued against her in 1881 to show cause why discharge should not be refused (Record, page 117). A *curator ad hoc* was also appointed (Record, page 109). An administrator was appointed (Record, pages 106, 107). For reasons which will be hereafter set forth, by the citation of the so-called administrator and of the *curator ad hoc*, no jurisdiction was obtained to revive the judgment

in accordance with the laws of Louisiana. The supreme court of Louisiana did not consider or rest its judgment sustaining the judgment of revival on the waiver of citation either by the administrator or the *curator ad hoc* (see opinion, Record, page 137). The whole opinion of the court in sustaining the proceedings to revive is based on the proposition that the assignee in bankruptcy is the proper representative of the bankrupt against whom to revive a suit.

Assignment of Errors.

Among the several assignments of error in the record (pages 150, 151) is this (No. 2): That the district and supreme courts of Louisiana erroneously held that under the national bankruptcy law of 1867 an assignee in bankruptcy who had filed his final account for a distribution of all the bankrupt's property, the bankrupt not receiving her discharge, was the representative of the bankrupt, and it is to this particular assignment of error that we propose to direct the remarks of this brief.

Argument.

The discussion naturally divides itself under three heads: 1. Is there in this case a Federal question? 2. Did the court below decide that Federal question erroneously? 3. If it had decided the Federal question correctly, must it have decided the case in favor of the appellant?

We shall consider these three questions in their order.

I.

The statute of Louisiana, article 3547 of the Civil Code, quoted above, provides for the prescription of judgments and

their revival. The question in this case is whether a proper revival of a judgment took place. If it did not, the appellant and the plaintiff below was entitled to the injunction which he sought, because the judgment lien which it was proposed to enforce had ceased to be. Article 3547 states that the revival may take place by the citation of the judgment debtor or his representative. In the case at bar the assignee in bankruptcy, W. T. Atkyns, was cited as the representative of the judgment debtor. Whether he was such a representative depends upon the agency and authority which he had from the person represented. Such agency and authority he could only acquire by virtue of the law under which he was made assignee in bankruptcy—that is, the national bankruptcy law. While, therefore, it is a State statute which the supreme court of Louisiana was applying, the particular case required the construction of the national bankruptcy law. In this way a Federal question was presented and was decided by the supreme court of Louisiana. The assignee in bankruptcy had no relation whatever to the judgment debtor except by virtue of the Federal law. By Federal law, therefore, the extent of that relation is limited and determined. Upon this point we are entitled to have the final decision of the Supreme Court of the United States as the tribunal of last resort in Federal questions. The supreme court of Louisiana decided that the assignee in bankruptcy was subject to service as the representative of the bankrupt after he had filed his final account and distributed all the property of the bankrupt, the bankrupt not being discharged under the laws of the United States. We claim that the assignee under the laws of the United States had immunity from such service, which the appellant in this case

had the right to rely upon, to annul the proceedings in revival. This brings the case within section 709 of the Revised Statutes, the old 25th section of the judiciary act, and confers the jurisdiction upon this Court to re-examine the case here.

II.

The representative character is of two kinds. A man represents another in a general or in a limited way. An administrator is the complete representative of his intestate. He is made so by law. He may sue or be sued as his intestate would have sued or been sued. On the other hand, the transfer of property from one to another makes the latter in a sense, and with respect to that property, the representative of his vendor. An assignee in bankruptcy, if he is the representative of the bankrupt at all, is his representative only in the latter sense. He takes the property of the bankrupt subject to the debts provable against the bankrupt at the time of the bankruptcy. Only with reference to those debts and the distribution of that property to pay them, can the assignee be said to be the representative of the bankrupt. He is not the personal representative in any sense. He is a trustee for the creditors of the bankrupt to distribute the property conveyed to him by the bankrupt to pay the bankrupt's debts. When he has done that he has discharged his trust and the relation of trust is ended. Strictly speaking, the assignee is not the representative of the bankrupt at all. While he acquires all the rights of the bankrupt, he is endowed with greater power than the bankrupt would have in acquiring property and in defeating debts. He represents the creditors and their

rights rather than the rights of the bankrupt. In the case at bar all the property of Mrs. Warfield which she owned at the time of her bankruptcy had been sold and the proceeds distributed and the final account of the assignee had been filed. He was *functus officio*. Even if the transfer of the property to him by the bankrupt had created the slightest representative character in the assignee, that had now passed by reason of the distribution of the property. Except as the assignee has the same interest in the property which his bankrupt had, there is no relation whatever between them. When this suit was brought to revive the judgment of the Chaffes against Mrs. Warfield there was no property in the hands of the assignee which he had derived from the bankrupt; neither he nor the creditors would be in the slightest degree affected by the revival of the Chaffe judgment. There was no property in which they had any interest upon which the revival would continue the lien. We have said that the only representative relation between the assignee and the bankrupt, if it could exist at all, must grow out of the property transfer. As the suit to revive could not have any relation or bearing upon the property transferred which had been long since distributed, then the assignee could not be the representative of the bankrupt so as to be served in the action to revive.

It has been decided by the supreme court of Louisiana that the only proper parties to an action to revive a judgment are the judgment creditor and the judgment debtor or his representative; that ownership of property to be affected by such revival does not make the person owning the property a proper party to the suit (Chapman *vs.* Nelson, 31 La. Ann., 343). As we have said, the assignee has no relation to

the bankrupt, except through the property which he obtains from him. If the principle just stated is the law of Louisiana, then the assignee in bankruptcy is never, under any circumstances, the representative of the judgment debtor to be cited in an action to revive. The bankrupt in the case at bar was not discharged. The judgment of Chaffe was therefore good against her, and might have been levied upon her after-acquired property. Had she been living in the State and parish at the time of the suit to revive she might have been served with the citation and the judgment properly revived against her. This will not be denied. If so, it plainly follows that in her absence her representative is not the assignee, whose powers do not depend upon her presence or absence, but is the person upon whom descends the right to represent her person—her personal representative. Such the assignee in bankruptcy clearly is not. It will be difficult to disentangle the decisions of the supreme court of Louisiana on this point. That court has expressly held in two or three cases cited in the main brief for appellant (page 24 *et seq.*) that the assignee in bankruptcy is not the representative to be cited in an action to revive. (See Chapman, executrix, *vs.* Nelson, 31 La. Ann., 342; Serra e Hijo *vs.* Hoffman & Co., 27 La. Ann., 18.) In one or two subsequent cases, including the present case, a different opinion was intimated. We respectfully submit that the reasoning in the first case is conclusive of the point, and that the present decision of the supreme court of Louisiana is a makeshift. It is an intimation that it is more important to have the principle decided than to have it rightly decided, because an action to revive is a mere statutory requirement not affecting substantial rights. We sub-

mit, however, that, as the rule sought to be laid down by the court requires for its validity the correct construction of the Federal powers of an assignee in bankruptcy, the supreme court of Louisiana cannot by judicial legislation increase or diminish those powers for any purpose.

III.

As will be seen by reference to the opinion of the supreme court of Louisiana (Record, pages 136, 137), the only point considered by that court was the question whether the service of the citation upon the assignee in bankruptcy was enough to warrant the judgment of revivor, and they held that it was. The court concedes that if the revivor was null and void the plaintiff below and appellant here was entitled to the injunction. The court did not consider the effect of the answer of the *curator ad hoc* and of the so-called administrator. It devolves upon us, therefore, to show to this Court, if the decision of the court below with reference to the representative character of the assignee in bankruptcy was erroneous, that the case should be reversed, and therefore to show that neither the answer of the *curator ad hoc* nor of the so-called administrator was a compliance with section 3547 of the Civil Code, cited above. For this purpose we content ourselves with a quotation from the larger brief already filed in the case.

Were the "representatives" of Mrs. Warfield, the absent heirs, cited through the *curator ad hoc? No citation was ever issued to him.* (R., page 109.)

Consequently none was served on him.

But defendant contended in the State court that the *cura-*

tor ad hoc waived citation and filed an answer, which dispensed with citation.

The *curator ad hoc* had no right to file an answer till he had been cited; and he could not waive citation or any other right of the absentees. (17 La., 117, *Collins* vs. *Beirce.*)

In *Hill et als.* vs. *Barlow et als.*, 6 Rob., 144, the court said:

"It is, therefore, *necessary* that the party be cited; and it cannot be controverted that any other means of knowledge of the proceedings instituted against him, brought home to the party against whom prescription is sought to be legally interrupted, would *not be sufficient* to interrupt prescription, in the true sense of the law. Now, in this case, the Commercial Bank having been made a party to the suit by the appointment of a *curator ad hoc*, said curator *acknowledged service* of the citation without waiting for the issuing of the process and for its service upon himself according to law. * * * It is said, however, that the *acceptance* of service by the *curator ad hoc* amounts to a legal interruption of the prescription of one year, and is binding upon the bank. Art. 57 of the Civil Code provides that 'if a suit be instituted against an absentee, who has no known agent in the State, the judge before whom the suit is pending shall appoint a *curator ad hoc* to DEFEND the absentee in the suit.' The same provision exists in articles 116, 964, of the Code of Practice, and the *object* of the law appears clearly to be that the *interests* of the *absentee* should not be sacrificed in his absence, but that, on the contrary, his *rights* should be well *defended* and in the same manner as if he were present. After the *curator ad hoc* has been appointed to an absent person the law requires that the petition and citation should be *served* upon him. (C. P., arts. 194, 195.) * * * And we are not ready to say that art. 177 of the same Code, which provides for the waiver or acknowledgment of service to be written on the back of the original petition by the defendant or his attorney, should apply to the *curator ad hoc*, since from the terms of the law it seems that such a waiver or acknowledgment is only to be made by the defendant personally or by his attorney whom he has employed. This *service* of the petition upon the *curator ad hoc* amounts to a notification of his appointment. Until then he has no capacity to act as

such, and it appears to us at least irregular, if not illegal, that he should take notice of his appointment and bring the absentee before the court by a simple acknowledgment of the *service* of citation or by a waiver thereof. This is not one of the modes recognized by law by which an absentee can be called before a court of justice to answer a demand made against him by one of our citizens.

"The *process* should be *regularly served* upon the curator appointed to defend him, and it seems to us that the latter cannot *waive* any of those legal proceedings which are instituted and required for the protection of the rights of the absentee whom he is called upon to defend. In 10 Martin, 474, this court held that every law that permits our courts to decide on the rights of those who are absent should be construed strictly, and that the formalities which it prescribed in allowing a creditor to pursue his debtor in this way ought to be exactly followed. If this be correct, and we do not doubt the correctness of the doctrine, it follows that the acknowledgment of service made in this way by the *curator ad hoc* was an *illegal act* on his part, and that as such it cannot prejudice the appellees. * * * And in this case we must come to the conclusion that the *curator ad hoc* had *no* authority to *waive* service of citation and by his voluntary act to cause the legal interruption of prescription set up as a peremptory exception by the appellees."

In *Hyde* vs. *Craddie* the court said that "a *curator ad hoc* appointed by the court to represent an absent defendant cannot be permitted to waive any of the legal rights of the party he represents." (10 Rob., 393.)

In *Krughler* vs. *The Bank of the United States*, 12 Rob., 465, although the *curator ad hoc* had filed an answer, the court held that the absentee had to be brought into court in the manner prescribed by law, and that the *curator ad hoc* could not in any way *waive* his rights. See also 5 An., 500, *Glacours* vs. *Lane;* 28 An., 259, *Ticknor* vs. *Calhoun;* 33 An., 212, *Bienvenue* vs. *Insurance Co.;* 38 An., 1168, *Cormer* vs. *Valcourt*, to the same purport.

In case cited in 28 An., 257, the court said:

"The *curator ad hoc* filed an answer and exception, and after trial and judgment it was discovered that no evidence of the citation of the absentee had been made. * * * The *curator ad hoc* cannot, directly or indirectly, *waive citation.*"

The answers of Cobb and Green, therefore, could not cure want of citation of the absentee.

Article 3547, Civil Code, provides the mode for reviving judgments "by having a *citation issued* according to law *to the* DEFENDANT OR HIS REPRESENTATIVE, * * * and if such defendant be absent and not represented the court may appoint a *curator ad hoc* to represent him in the proceedings, *upon which curator ad hoc the citation* SHALL BE SERVED."

It is the *service of citation alone* which interrupts the prescription.

Was Austin Green, clerk of the district court, the legal "representative" of Mrs. E. W. Warfield, the judgment debtor? The supposition is preposterous.

She had permanently removed from the State two years before her death; she did not own any property in Ouachita parish or in Louisiana when she died, and she died in the State of Tennessee.

The Civil Code, article 934, declares that the place of the opening of succession is fixed as follows:

"In the parish where the deceased resided, if he had a fixed domicile or residence in the State.

"In the parish where the deceased owned immovable property, if he had neither domicile nor residence in the State or in the parish in which it appears by the inventory his principal effects are, if he had effects in different parishes.

"In the parish in which deceased has died, if he had no

fixed residence nor any immovable effects within the State at the time of his death."

The courts of Louisiana, therefore, had no jurisdiction over Mrs. Warfield's succession, which was in the State of Tennessee.

But if she had had property in Ouachita parish or had died there the clerk of the court as such could not have been appointed, as he was without an application and publication or notice of the application, inventory, or bond. The law under which this appointment was made was repealed long ago.

The section 3691 of Revised Statutes of 1870 (act of 1853) authorizing clerks of court to assume the administration of estates under $500 in certain cases was repealed by section 9 of the act of 5th of March, 1870, No. 87, page 120, of Acts of 1870, creating public administrators. (See 25 An., 217, succession of Winn.)

Act of 1870, page 80, No. 40, gives precedence in authority to acts passed at that session over everything in the Revised Statutes or Civil Code or Code of Practice in conflict with any act passed at that session.

Section 3691 of Revised Statutes of La., page 716, reads as follows:

"Whenever it shall be found by the clerk that a succession is so small or so much in debt that no person will apply for or is willing to accept the curatorship, or when a vacancy exists in such appointment to which no one demands the nomination, the clerk shall assume the administration of such succession. He shall cause its effects to be sold and the proceeds to be applied to the payment of its debts, the whole to be done in as summary a manner as possible to diminish costs: *Provided*, That this section is not to apply to successions amounting to more than $500.

Act No. 50, page 80, of the Acts of 1870 of the Legislature of Louisiana, gives precedence in authority to acts passed at that session over everything in the Revised Statutes or Civil Code or Code of Practice in conflict with any act passed at that session. It is as follows:

"That the acts and joint resolutions passed during the present session of the General Assembly which may be contrary to or in any manner conflict with the acts of the present session, known as the revision of the general character, and of the Civil Code or Code of Practice shall have precedence of said revisions and be held as the law in opposition thereto and as repealing those acts so far as they may be in opposition or conflict."

The act of 1870, No. 87, page 120, is as follows:

"SEC. 1. That the Governor of the State of Louisiana shall appoint a suitable person, to be known as public administrator, for each and every parish in the State, whose duties and powers shall be as follows: In all intestate successions where there is no surviving husband or wife or heir present or represented in the State the public administrator of the parish shall be appointed by the judge of the proper court to administer the same."

"SEC. 4. That all vacant successions shall be administered by the public administrator of the parish in which the deceased died until the heirs present themselves and are recognized by the court and put in possession, and if no heirs present themselves within one year the funds resulting from such estate shall be paid into the treasury of the State."

"SEC. 9. That all laws on the same subject-matter inconsistent with this law are hereby repealed."

The office of public administrator was abolished by section 1 of article No. 74 of the acts of 1877, and it provides as follows:

"SEC. 1. That the office of public administrator, created by act No. 87 of the General Assembly, approved 5th March, 1870, * * * be, and the same is hereby, abolished in

every parish of the State of Louisiana except in the parish of Orleans, and that hereafter all successions opened in said parishes, outside of the parish of Orleans, shall be administered upon by persons selected, appointed, and confirmed under and in conformity with the articles of the Civil Code and Code of Practice relating to the subject-matter of successions and the administration thereof."

Article 1190 of the Revised Civil Code says:

"If a succession is so small or is so much in debt that no one will accept the curatorship of it, the judge of the place where the succession is opened, after having ordered an inventory of the effects composing it, shall appoint the district attorney of the district or the attorney *pro tempore* of the parish curator of said succession, who shall cause the effects to be sold," etc., etc.

Both must be appointed by the court on the petition of the applicant (C. C., 1115, 1116, 1117), and there must be an inventory (C. C., 1104), and he must take an oath and give bond (C. C., 1126).

And "all actions which could have been brought against the deceased must be commenced, cumulated, and prosecuted before the judge of the place where the succession is opened and brought against the curator appointed by the judge, as is hereinafter prescribed." (C. C., 1113; C. P. 122.)

Therefore the appointment of Austin Green, clerk of the district court, administrator of Mrs. Warfield was a nullity.

It is respectfully submitted, therefore, that there was no legal citation upon the representative of the judgment debtor either by citing her assignee or by the answer of the so-called *curator ad hoc* or of the so-called administrator.

Finally, the question may be asked whether the hypothe-

cary action which was brought before the judgment was prescribed, and judgment in which was obtained, did not interrupt the prescription of the judgment so as to make an action to revive unnecessary. This is not even suggested in the opinion of the supreme court of Louisiana. It seems to be well settled that the hypothecary action could not give any additional life to the judgment, and that the judicial mortgage growing out of the judgment can only be continued beyond the time of the prescription by a statutory action to revive.

"A citation in a suit to revive a judgment would not interrupt the prescription of the judgment." (4 An., 509, *Jacobs* vs. *Calderwood;* 31 An., 396, *Chapman, ex.*, vs. *Citizens' Bank.*)

"L'interruption de la prescription de l'hypothèque n'interroupt pas la prescription de l'action personelle." (*Trolang, Hypothèques*, 4, 878, *bis.*)

"Sarsque l'immenble hypothèque est passé dans les mains d'un tiers détenteur, les actes d'interruption de l'action personelle contre le débiteur n'interroupt pas la prescription à l'egard du tiers détenteur; réciproquement, l'interruption de l'action hypothècaire n'interroupt pas la prescription de l'action principale." (*Trolang, Prescription*, 2 No., 659.)

It is respectfully submitted that the judgment of the court below should be reversed, and that the case should be remanded with instructions to enter a decree perpetually enjoining the execution in the hypothecary action.

WM. H. TAFT,
Of Counsel for Appellant.

Office Supreme Court U. S.
FILED.
JAN 13 1892
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 178.

JOHN T. LUDELING

vs.

J. & C. CHAFFE.

Error from the Supreme Court of Louisiana.

Supplemental brief for defendants, appellees.

Until the passage of the act of 1853, judgments in Louisiana were not prescriptible. Then for the first time it was provided "all judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of such judgments," thus fixing their prescription at the longest time known to our law for the prescription of personal actions.

It was at the same time provided that any party interested might have the judgment revived at any time before it is prescribed by having a citation issued according to law to the defendant or his representatives from the court which rendered the judgment, unless the defendant or his representative show good cause why the judgment should not be revived.

These provisions were re-enacted in terms in the Revised Civil Code, art. 3547, under the general head of "Prescription which operates a release of debt."

For some years it was thought that our courts might hold that this statute of 1853 was the *only* means by which a judgment could be preserved longer than ten years, and many lawyers, out of great caution, pursued as far as practicable the course indicated by article 3547 for the preservation of judgments.

In 1878 the first case involving this point was decided by the supreme court of Louisiana—Suc. J. C. Patrick, 30th An., 1071. After a thorough examination in all its bearings, the court said: "The law of this State authorizing the revival of judgments was not intended to provide any different mode of *interrupting* prescription of judgments from those applied to other forms of debt, but was *only* intended to prevent the prescription of judgment debts and continue them in force ten years from the date of the judgment of revival. The prescription of a debt evidenced by a judgment can be interrupted in the same modes as the prescription of debts evidenced in any other way, except the acknowledgment of the judgment debt after prescription has acquired must be in writing."

Again, in 1881, the supreme court of Louisiana, in Ada Calhoun *vs.* Levy, 33rd An., 1296, said: "Art. 3547 C. C., under which judgments are revived, did not provide an *exclusive* mode of preventing the prescription of judgments."

In 1882, in Levy *vs.* William Calhoun, 34th An., 413: "Prescription of a judgment may be interrupted by other modes than a suit in revival of the judgment."

In 1885, in Suc. of Saunders, 37th An., 769, the supreme court of Louisiana settled the question beyond dispute, holding that "successive decisions of this court have established the doctrine that the prescription of judgments may be interrupted in the same mode and by the same means that prescription of other debts may be interrupted."

Very recently, in 1890, in the case of Norres *vs.* Hayes, 42d An., 857, the principle is reaffirmed, and in the same An., page 153 (Lalane *vs.* Payne), the supreme court of Louisiana not only confirms its former ruling, but also says, "Hence we conceive the argument in favor of the binding force of a judgment the prescription of which has been legally interrupted, as to third persons, is just as strong as that of a judgment of revival. Either mode rehabilitates the judgment and keeps it alive. If kept alive for one purpose, it is for another."

The discharge of debts by lapse of time is based upon the presumption of payment. Any acknowledgment, actual or constructive, which destroys the presumption interrupts prescription. A partial payment of a note or other debt interrupts prescription and gives new birth to the debt. So, under the doctrine above established by our court, if a partial payment of a judgment must interrupt prescription if made voluntarily by the judgment debtor and if by a forced sale of his property on execution, does it not follow that the presumption of payment otherwise is destroyed, and does it not have the same effect on the fundamental principle as payment by the debtor would have?

The petition of plaintiff recites the fact that, commencing with 1875, the judgment creditors (the present defendants) issued executions from time to time, resorted to all the processes known to the law, to compel the payment of their debt out of the property of the judgment debtor. The credits on the writs, as shown in the record, the returns of the executive officers, and the allegations of plaintiff, show sundry payments—forced, however, and through the sheriff—from February, 1875, to September, 1879.

This clearly rebuts the presumption of payment.

In 1881 the suit of Chaffe *vs.* Ludeling, to enforce by hypothecary action the payment of the balance of their judgment against Warfield, was brought, and, in June, 1882, the supreme court of Louisiana rendered final judgment, in

which Ludeling was required to pay the debt in person or surrender the property in his possession. All this time our clients have been trying to collect their debt, and now the only defense is that prescription has acquired because we have not been sufficiently diligent in the prosecution of our rights. Therefore by the time secured by the plaintiff's dilatory pleas and appeals our debt is paid by presumption.

Ludeling is the third person alluded to in the case of Lalane, 42nd An., 154, and our judgment is kept alive as to him and for all purposes.

Revival by motion and citation is one of the modes provided by law for preserving the judgment, and we have exhausted the law in our effort to revive by this means and preserve our rights under the judgment. We have no doubt that the reasoning of the supreme court of Louisiana is eminently correct. We present these views on the question of prescription as a practical and full solution of the difficulty which apparently would obstruct the enforcement by law of the rights of the creditor.

Our original judgment compelling Ludeling "either to pay the judgment, with the costs thereof, or give up the land to be sold therefor," was rendered in 1882. When we sought to enforce this final judgment we were met by the injunction, obtained substantially on the same grounds urged against our original suit. There was judgment in 1888; and now, after nearly ten years of delay by the judgment debtor, may we not hope for a final recognition of our rights?

Respectfully submitted.

CHARLES J. BOATNER,
Of Counsel.

Office Supreme Court U. S.
FILED.
JAN 22 1892
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 178.

M. C. LUDELING, Ex'r, etc., PLAINTIFF IN ERROR,

vs.

JOHN AND CHARLES CHAFFE ET AL., DEFENDANTS IN ERROR.

Reply to Supplemental Brief for Defendants in Error.

Counsel for defendants in error has filed a supplemental brief, in which he attempts to establish that the prescription relied upon in this case by the plaintiff in error was interrupted otherwise than by the action to revive the judicial mortgage. We concede that the prescription on a judgment may be prevented in other ways than by an action to revive in Louisiana. This has been established in the following cases:

Succession of J. C. Patrick, 30 La. Ann., 1071.
Calhoun vs. *Levy*, 33 La. Ann., 1296.
Levy vs. *Wm. Calhoun*, 34 La. Ann., 413.
Succession of Saunders, 37 La. Ann., 769.
Lalane vs. *Payne*, 42 La. Ann., 153.
Norres vs. *Hayes*, 42 La. Ann., 857.

There is nothing in this suit, however, to show that the prescription running on the judgment rendered in 1874 was interrupted. The contention of the counsel for the defendants in error is that the issuance of execution on a judgment and the collecting thereby of part of the debt interrupts prescription. There is nothing in the authorities to which reference has been made which justifies any such inference. The only mode suggested in any of the authorities for the interruption of prescription on the judgment is an acknowledgment of the validity of the judgment, either by express words or by a voluntary payment upon the same. Money collected by execution is not a constructive acknowledgment by the person from whom it is collected of the validity of the judgment. Even conceding the theory that prescription is founded on a presumption of payment to be the correct one, the litigation referred to and Ludeling's pleadings therein show that, so far as Ludeling was concerned, he was contending all the time that the judgment had in fact been paid by the property of the judgment debtor which the judgment creditor had received. There is, therefore, in the record no acknowledgment on the part of Ludeling of the existence of an unpaid judgment, but, on the contrary, his position and his whole conduct were the continued assertion of the full satisfaction of the judgment.

But Ludeling's acts in the premises are immaterial and irrelevant in this discussion. Article 3411 of the Civil Code of Louisiana provides that a mortgage is extinguished by the extinguishment of the debt which it secures, and the same thing is borne out by the language of article 3285 of the Civil Code, which declares:

"Consequently it is essentially necessary to the existence of a mortgage that there shall be a principal debt to serve as a foundation for it. Hence it happens that in all cases where the principal debt is extinguished the mortgage disappears with it."

The question here, therefore, is the prescription upon the debt represented by the judgment of the Chaffes against Mrs. Warfield, the judgment debtor. See *Dawson* vs. *Thorpe*, 39 La. Ann., 366. Prescription on that debt could only be interrupted either by suit to revive against Mrs. Warfield or her representative or by matters *en pais* by Mrs. Warfield. The case of *Lalane* vs. *Payne*, in 42 La. Ann., 153, affirms no different doctrine. It holds only that a third person may be affected by the interruption *en pais* of prescription just exactly as the third person would be affected by an action to revive. Necessarily the matters *en pais* must be between the same parties who would be parties to the action to revive. Any acknowledgment by Ludeling of the existence or validity of the judgment unpaid could not interrupt prescription on the debt which should bind Mrs. Warfield, because Ludeling was no party to the debt or to the judgment in which the debt is embodied. If Mrs. Warfield, however, had acknowledged the existing liability of the judgment within the time before prescription had run, that would have bound Ludeling exactly as the revival by action would have bound him. In the case of *Lalane* vs. *Payne*, 42 La. Ann., 152–154, the contention of counsel was stated by the court as follows:

"As we understand plaintiff's counsel, his contention is that while it is the settled jurisprudence of this court that the prescription of a judgment may be interrupted by other means than a suit to revive, only parties to the record can be affected by such interruption *en pais*."

And the conclusion of the court as to that proposition is:

"Hence we conceive the argument in favor of the binding force of a judgment the prescription of which has been legally interrupted as to third persons is just as strong as that of a judgment to revive. Either mode rehabilitates the judgment and keeps it alive. If kept alive for one purpose, it is for another."